Supreme Court, U.S.
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In The

Supreme Court of the United States

HAIDAR MUHSIN SALEH,
ILHAM NASSIR IBRAHIM, et al.,

Petitioners,

v.

CACI INTERNATIONAL
AND TITAN CORPORATION,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred by finding, contrary to all other circuits that have addressed the issue, that Petitioners' claims for torture and other war crimes cannot be brought against private actors under the Alien Tort Statute.

2. Whether the Court of Appeals erred by creating a "battle-field preemption" doctrine that extends derivative sovereign immunity to contractors in conflict with this Court's decisions in *Boyle v. United Technologies Corp.* and *Wyeth v. Levine*.

PARTIES TO THE PROCEEDINGS

The following persons have appeared below as plaintiffs in *Saleh et al. v. Titan Corp. et al.*, appellants in the Court of Appeals as to the district court's grant of summary judgment to the Titan defendants, and appellees as to the district court's denial of summary judgment to the CACI defendants: Haidar Muhsin Saleh, Haj Ali Shallal Abbas Al-Uweissi, Jilal Mehde Hadod, Umer Abdul Mutalib Abdul Latif, Ahmed Shehab Ahmed, Ahmed Ibrahiem Neisef Jassem, Ismael Neisef Jassem Al-Nidawi, Kinan Ismael Neisef Al-Nidawi, Estate of Ibrahiem Neisef Jassem, Mustafa (last name under seal), Natheer (last name under seal), Othman (last name under seal), and Hassan (last name under seal).

The following persons have appeared below as plaintiffs in *Ibrahim et al. v. Titan Corp. et al.*, appellants in the Court of Appeals as to the district court's grant of summary judgment to the Titan defendants, and appellees as to the district court's denial of summary judgment to the CACI defendants: Ilham Nassir Ibrahim, Saddam Saleh Aboud, Nasir Khalaf Abbas, Ilham Mohammed Hamza Al Jumali, Hamid Ahmed Khalaf, Al Aid Mhmod Hussein Abo Al Rahman, Ahmad Khalil Ibrahim Samir Al Ani, Israa Talb Hassan Al-Nuamei, Huda Hafid Ahmad Al-Azawi, Ayad Hafid Ahmad Al-Azawi, Ali Hafid Ahmad Al-Azawi, Mu'Taz Hafid Ahmad Al-Azawi, and Hafid Ahmad Al-Azawi.

PARTIES TO THE PROCEEDINGS – Continued

The following entities have appeared as defendants in district court, and appellees in the Court of Appeals: Titan Corporation, L-3 Communications Titan Corporation, and L-3 Services, Inc.

The following entities have appeared as Defendants in the district court, appellants in the Court of Appeals as to the denial of their motion for summary judgment, and intervenors in the Court of Appeals as to the plaintiffs' cross-appeal: CACI International, Inc. and CACI Premier, Inc.

There were no amici below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-83) is reported at 580 F.3d 1. The opinion of the district court on summary judgment (App. 84-06) is reported at 556 F. Supp. 2d 1. The opinion of the district court on the motion to dismiss in *Saleh v. Titan* (App. 107-17) is reported at 436 F. Supp. 2d 55. The opinion of the district court on the motion to dismiss in *Ibrahim v. Titan* (App. 118-40) is reported at 391 F. Supp. 2d 10.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §1331, as Petitioners' case presented federal questions; under 28 U.S.C. §1350, as Petitioners' case presented torts committed against aliens in violation of the law of nations; under 28 U.S.C. §1332, as diversity jurisdiction exists here; and under 28 U.S.C. §1367, as the court had supplemental jurisdiction over Petitioners' common-law causes of action. The judgment of the three-judge panel of the court of appeals was entered on September 11, 2009. Petitioners' timely-filed petition for rehearing *en banc* was denied by the court of appeals on January 25, 2010. The

jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Tenth Amendment to the U.S. Constitution, which states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

This case also involves Article I, Section 10, clause 3 of the U.S. Constitution, which states that:

> [n]o State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

This case also involves Article VI of the U.S. Constitution, which provides in pertinent part that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the

> Constitution or Laws of any State to the Contrary notwithstanding.

The Alien Tort Statute ("ATS"), 28 U.S.C. §1350 provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The ATS is reproduced at App. 142.

The Federal Tort Claims Act ("FTCA"), 28 U.S.C. §1346 *et seq.*, reproduced at App. 141, provides in part that:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §2671, reproduced at App. 141, defines "Federal Agency," as used in section 1346, to include "the executive departments, the judicial and legislative branches, the military departments, independent

establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States." 28 U.S.C. §2680(a), reproduced at App. 142, excludes from section 1346's waiver of sovereign immunity:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. §2680(j) of the Act, reproduced at App. 142, excludes from section 1346's waiver of sovereign immunity from tort liability "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."

The War Crimes Act, 18 U.S.C. §2441, provides in part that:

> **(a) Offense.** – Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

> **(b) Circumstances.** – The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).
>
> **(c) Definition.** – As used in this section the term "war crime" means any conduct –
>
> (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party; . . . .

The full text of the Act is reproduced at App. 148.

Other relevant statutory and regulatory provisions are set forth in the Appendix.

STATEMENT

Petitioners, victims of war crimes at Abu Ghraib prison, brought suit against two government contractors. Their claims have been dismissed before any merits adjudication on the grounds that Respondents are immune from suit based on their status as government contractors. The majority created a blanket immunity by (1) ruling that Petitioners' claims for murder, torture and other war crimes under the Alien Tort Statute could not be brought against non-state parties, and (2) creating a novel "battle-field preemption" doctrine that places the more than 200,000

contractor employees supporting the military in Iraq and Afghanistan wholly outside the existing tort system.

This Court should issue the writ. First, as discussed in Section I, the majority's ATS ruling creates a clear circuit split. Second, as discussed in Section II, the majority's creation of "battle-field preemption" failed to follow *Boyle v. United Technologies*, 487 U.S. 500 (1988), and ignored the preemption jurisprudence culminating in *Wyeth v. Levine*, 129 S.Ct. 1187 (2009). The majority's new judicial doctrine directly contradicts the Executive's expressed preference to rely on the existing structure of tort liability as a tool to deter contractor misconduct.

STATEMENT OF FACTS

Respondents CACI International, Inc. ("CACI") and Titan Corporation ("Titan") provided interrogation and translation services under government contract at the Abu Ghraib prison in Iraq. *Titan* J.A. 384-403; *CACI* J.A. 319-88.[1] Petitioners, civilian detainees,[2] allege CACI and Titan employees repeatedly punched and kicked them, beat them with sticks,

---

[1] "*CACI* J.A." and "*Titan* J.A." refers to the Joint Appendices filed in the Court of Appeals. "*Titan* J.A.S." refers to the sealed supplement of the Joint Appendix filed in the Court of Appeals.

[2] It is unclear why the majority referred to Petitioners as "enemy combatants," a term nowhere supported by record evidence and never ascribed to them by the U.S. government or military. Petitioners and other prisoners at Abu Ghraib were civilian detainees protected by the Geneva Conventions. *Titan* J.A. 530.

guns and cables; slammed them into cell walls; raped, sexually assaulted, and sexually humiliated them; subjected them to electric shocks; deprived them of food and sleep; threatened them with dogs; shackled them in painful positions for hours; urinated on them; confined them in coffin-sized boxes; exposed them to extreme heat and cold; forced them to watch the beating and rape of other prisoners, including their family members; and threatened them with rape and execution. *Titan* J.A. 201-07, 216-28, 261-67, 271-74, 278-83, 287-302. Several Petitioners were tortured into unconsciousness; several were murdered. *Titan* J.A. 216-18, 223-24, 291, 294, 299.

The military found CACI and Titan employees violated the laws of war. The military's initial investigation conducted by General Taguba found that "between October and December 2003, at the Abu Ghraib Confinement Facility (BCCF), numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees." *Titan* J.A. 630. General Taguba identified certain CACI and Titan employees as perpetrators of the sadistic, blatant and wanton criminal abuses. *Titan* J.A. 631, 633, 640. The military conducted additional investigations, and identified additional CACI and Titan employees who had assaulted detainees. *Titan* J.A. 525, 556-64.

The military lacked the power to court martial CACI and Titan employees, although it did court martial certain soldiers who conspired with them. Evidence adduced during these military proceedings

demonstrated CACI employees were ringleaders in the Abu Ghraib abuse scandal. *CACI* J.A. 480-82, 500-02, 507-19, 531-89; *Titan* J.A. 622-26, 643-719; *Titan* J.A.S. 1318-74.

1. PROCEEDINGS BELOW

None of Petitioners' allegations was adjudicated by the district court. Instead, on August 12, 2005, the district court (Judge James Robertson) ruled under Fed. R. Civ. P. 12(b)(6) that Petitioners' war crimes claims (including murder and torture) raised under the Alien Tort Statute failed to state a claim because Petitioners did not allege state action, only action by private parties. App. 109-11, 121-24. The district court held that "the question is whether the law of nations applies to *private actors* like the defendants in the present case. . . ." and found that "in the D.C. Circuit the answer is no." App. 122 (citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985)) (emphasis in original.) The district court found this Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) did not overrule these D.C. Circuit holdings, and did not resolve the circuit split. App. 110, 122.

The district court further held that Respondents were potentially eligible to invoke "the government contractor defense" created by this Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). App. 115-16, 128-34. The district court ruled merits

discovery could ***not*** proceed, and ordered the parties to conduct discovery regarding Respondents' contractual responsibilities, reporting structures, supervisory structures, and structures of command and control. App. 115-16, 133-35.

Respondents thereafter moved for summary judgment. Respondent Titan argued that it merely loaned its employees to the military, and therefore could not be held to have any liability arising from their misconduct. Respondent Titan submitted evidence establishing that Titan failed to create the contractually-required oversight structure, and did not supervise its employees located at Abu Ghraib prison. Respondent CACI admitted that CACI management was present at Abu Ghraib, and had the authority to stop their employees from torturing detainees. Respondent CACI claimed that their employees were nonetheless under the military's command and control.

Petitioners argued that permitting claims challenging extracontractual and illegal conduct furthered, not conflicted with, the military's position that the torture at Abu Ghraib was illegal, unauthorized, and not designed to serve any military purpose. Petitioners submitted evidence from military regulations and field manuals establishing that the military was not responsible for supervising CACI and Titan's corporate employees. App. 162-65. Petitioner submitted testimony from military personnel that they did not supervise CACI and Titan employees at Abu Ghraib, *CACI* J.A. 463-93, *Titan* J.A. 724-35, and

from Titan and CACI employees stating that they were not under military command, *CACI* J.A. 389-90, *Titan* J.A. 514-21.

The district court denied Respondent CACI summary judgment, holding that "a reasonable trier of fact could conclude that CACI retained significant authority to manage its employees." App. 105. The district court granted Respondent Titan's motion for summary judgment, holding "Titan has shown that its linguists were fully integrated into the military units to which they were assigned and that they performed their duties under the direct command and exclusive operational control of military personnel." App. 103.

Respondent CACI successfully sought interlocutory appeal. Petitioners cross-appealed the district court's grant of summary judgment to Titan.

On appeal, a divided panel of the U.S. Court of Appeals for the District of Columbia dismissed Petitioners' claims against both CACI and Titan. The majority (Judges Silberman and Kavanaugh) held that "the very purposes of tort law are in conflict with the pursuit of warfare." App. 16. The majority coined the term "battle-field preemption," and ruled that "[d]uring wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted." App. 19. The majority found irrelevant that the misconduct at issue violated

the express terms of the contract and the law. App. 15-16, 23. The majority also dismissed the plaintiffs' torture and other war crimes claims under the ATS, holding that private actors cannot be held liable under the ATS. The majority acknowledged that this holding created a split among the circuits. App. 31.

A well-reasoned and persuasive dissent (Judge Garland) pointed out the flaws in the majority's new "battle-field preemption" doctrine.[3] The dissent found that "[n]o Executive Branch official has defended such conduct or suggested that it was employed to further any military purpose. To the contrary, both the current and previous Administrations have repeatedly and vociferously condemned the conduct at Abu Ghraib as contrary to the values and interests of the United States. So, too, has the Congress." App. 38. The dissent noted *Boyle* pre-emption "has never been applied to protect a contractor from liability resulting from the contractor's violation of federal law and policy," App. 52, and that there was "no evidence in the record of these cases . . . that the brutality the plaintiffs allege was authorized or directed by the United States." App. 79. The dissent cited the 2004 Article 15-6 Investigation report stating that "numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees"

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[3] The dissent does not address ATS claims on the grounds that the state-law claims should go forward, and "plaintiffs do not contend that their Alien Tort Statute claims would provide them with different relief." App. 82.

at Abu Ghraib, and quoted both Executive and Legislative Branch condemnations of the "despicable acts" at Abu Ghraib prison. App. 39.

The dissent examined whether a principled basis exists to sustain the majority's "battle-field preemption" and found none. *First*, the dissent reviewed the text of the FTCA, and agreed "the FTCA's policy is to eliminate *the U.S. government's* liability for battle-field torts. That, after all, is what the FTCA says." But, the dissent continued, "it is not plain that the FTCA's policy is to eliminate liability when the alleged tortfeasor is a contractor rather than a soldier. That, after all, is *not* what the FTCA says." App. 60 (noting that the FTCA's and the Westfall Act's definitions of "federal agency" specifically exclude contractors.) The dissent explained the majority's holding contradicts the FTCA, and "grants private contractors *more* protection than our soldiers and other government employees receive." App. 61. *Second*, the dissent agreed that war and foreign policy are the province of the Executive, but pointed out that the "court has removed an important tool from the Executive's foreign policy toolbox." App. 66. The dissent also found that "the position DOD took in its rulemaking on contractor liability may reflect the government's general view that permitting contractor liability will advance, not impede, U.S. foreign policy by demonstrating that the United States is committed to ensuring that its contractors are subject to proper oversight and held accountable for their actions." App. 65 (internal quotations omitted.)

Petitioners unsuccessfully sought *en banc* review, App. 140, and thereafter filed this Petition in a timely manner.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ in this case: *First*, as explained in Section I, the majority ignored the policy of the legislative and executive branches and created a clear circuit split by holding that torture and other war crimes claims cannot be asserted against private parties such as CACI and Titan. Given that Petitioners' claims arise from the Abu Ghraib prison scandal that disgraced our nation, and that war crimes are always issues of national and global importance, this Court should deem this particular circuit split on war crimes as worthy of resolution.

Second, this Court should review the majority's "battle-field preemption" premised on its finding that "the very purposes of tort law are in conflict with the pursuit of warfare." The majority's preemption ruling failed to adhere to this Court's *Boyle* decision that limits preemption to instances of direct conflict between federal interests and state tort claims (Section II.A), and contravenes the Constitution and well-established preemption jurisprudence of this Court (Section II.B). Finally, as explained in Section II.C, this ruling substituted judicial for military judgment on how to manage contractors, and disrupted the military's intentional reliance on the tort system as

one tool to deter misconduct by corporate defense contractors.

I. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT ON WHETHER TORTURE AND OTHER WAR CRIMES CLAIMS REQUIRE STATE ACTION UNDER ATS.

The majority's dismissal of Petitioners' ATS torture and other war crimes claims created a clear circuit split with the Second and Eleventh Circuits, as the majority itself acknowledged. App. 31. As the majority concedes, Petitioners' torture claims would be cognizable under *Sosa* had they been brought against state actors. App. 34 ("Although torture committed by a state is a recognized violation of a settled international norm, that cannot be said of private actors.")[4] The majority, however, held that the status

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[4] The district court did not permit discovery or adjudicate the factual validity of Petitioners' allegations of torture and other war crimes. As a result, the majority had to accept Petitioners' allegations as true. App. 38, 44 (citing *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993)); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Gibson v. City of Chicago*, 910 F.2d 1510, 1520-21 (7th Cir. 1990); *Robison v. Canterbury Village, Inc.*, 848 F.2d 424, 426, 429 (3d Cir. 1988); *Chipanno v. Champion Int'l Corp.*, 702 F.2d 827, 831 n.2 (9th Cir. 1983). Although the majority questioned whether Petitioners raised the torture and war crime allegations in the appellate briefing on the government contractor defense, Petitioners did so. As but one example, Petitioners cited and appended evidence regarding sexual assaults by Titan translator, Adel Nakhla, in which Nakhla confessed to military investigators that he had voluntarily

(Continued on following page)

of CACI and Titan as non-state actors prevents Petitioners' claims from falling within the parameters set by *Sosa*.

This erroneous holding created an important circuit split worthy of this Court's review. Permitting redress through the ATS is one way in which the United States fulfills its obligations to other nations and under international law. It is essential to this nation's security and standing in the world that our judicial system fulfill our obligations. Here, Congress and the Executive unequivocally condemned Respondents' misconduct, and expressed confidence that our system of justice would result in accountability. App. 38-40. Immediately after the events giving rise to this lawsuit, President Bush expressly condemned the misconduct at Abu Ghraib and affirmed our nation was committed to fulfilling its obligations under international law to provide a full accounting and remedy for the victims.[5] Failing to correct the majority's error will create unnecessary and serious problems for the Executive's diplomatic efforts.

The Second Circuit held that war crimes may be asserted against non-state actors under the ATS. *See, e.g., Presbyterian Church of Sudan v. Talisman Energy Co.*, 582 F.3d 244, 254-55 (2nd Cir. 2009)

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participated in forcing three naked prisoners to engage in sexual contact. *Titan* J.A. 622-26.

[5] President's Statement on the U.N. International Day in Support of Victims of Torture, June 26, 2004.

petition for cert. filed Apr. 15, 2010 (No. 09-1262), citing *Kadić v. Karadžić*, 70 F.3d 232, 244 (2nd Cir. 1995); *Khulumani v. Barclay National Bank, Ltd.*, 504 F.3d 254, 270, n.5, 282 and 289 (2nd Cir. 2007); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 173 (2d Cir. 2009) *petition for cert. filed July 8, 2009* (No. 09-34) (affirming that ATS claims may be brought against private actors "when tortious activities violate norms of 'universal concern' that are recognized to extend to the conduct of private parties – for example, slavery, genocide, and war crimes"); *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 447-48 (2nd Cir. 2000) (same). In *Kadić*, the court held that "in the modern era" international law does not confine its reach to state action, and "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals." 70 F. 3d at 239. Looking to the law of nations for guidance, including Common Article 3 of the 1949 Geneva Conventions, the court found that "[t]he liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II." *Id.* at 243. The court found that if torture were committed in furtherance of war crimes, then no state action should be required for liability. *Id.*

The Eleventh Circuit reached the same conclusion. *See Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1266-67 (11th Cir. 2009) (stating that "plaintiffs need not plead state action for claims of torture and murder perpetrated in the course of war crimes");

Romero v. Drummond Co., Inc., 552 F.3d 1303, 1316, (11th Cir. 2008), *reh'g en banc denied*, 2009 U.S. App. LEXIS 2880 (11th Cir. Feb. 18, 2009) (holding "individuals may be liable, under the law of nations, for some conduct, such as war crimes, regardless of whether they acted under color of law of a foreign nation"). *See also Aldana v. Del Monte*, 416 F.3d 1242 (11th Cir. 2005).[6]

Numerous district courts have followed the Second and Eleventh Circuits in finding that non-state actors can be held liable for certain violations of international law. *See, e.g., In re: Xe Services Alien Tort Litig.*, 665 F. Supp. 2d 569, 584-85 (E.D.Va. 2009); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 100 (D.D.C. 2003); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 445 (D.N.J. 1999).[7]

The Second and Eleventh Circuit's analysis is consistent with the decision taken by both Congress

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[6] The majority's conclusion that plaintiffs cannot allege that the private-actor defendants are acting "under color of law" without simultaneously bestowing on them sovereign immunity is also counter to precedent of this Court and other circuits, which have found that private-actors were acting "under color of law" for purposes of liability under 42 U.S.C. §1983 or the ATS, but were not state actors entitled to sovereign immunity. *See, e.g., Dennis v. Sparks*, 449 U.S. 21 (1980); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994); *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88 (2nd Cir. 2000).

[7] Others have not. *See, e.g., Al Shimari v. CACI Premier Tech., Inc.*, 657 F. Supp. 2d 700 (E.D.Va. 2009).

and the Executive that non-state actors who torture prisoners in the course of an armed conflict are guilty of war crimes. 18 U.S.C. §2441(b); 48 C.F.R. §252.225-7040(e)(2)(ii). *See also* 10 U.S.C. §948a(7), §948b, §948c, §950t; 68 Fed. Reg. 39381-39387 (2003) (defining non-state actors' wrongful acts, including torture, as war crimes triable by military commission.)

The reasoning in *Sosa* supports the holdings of the Second and Eleventh Circuits, not the majority opinion. In *Sosa*, this Court found that the law of nations included "a second, more pedestrian element regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor." 542 U.S. at 715. *Id.* (finding that there was "a sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships.")

The Court cited favorably the 1795 opinion issued by Attorney General Bradford that finds ATS liability extends to private actors whose acts violate the law of nations. Breach of Neutrality, 1 Op. Att'y Gen. 57, 59 (1795) (stating that "there can be no doubt that the company or individuals" injured by private American citizens who joined a French attack on the British colony of Sierra Leone "have a remedy by a civil suit in the courts of the United States" under the ATS.) *See also Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 156-7 (1795) (private actors who had unlawfully captured a Dutch ship had violated the law of nations and were liable for the value of the captured assets.)

The Court in footnote 20 cited both *Kadić* and Judge Edwards' concurrence in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-95 (D.D.C. 1984), and set forth as "a related consideration" whether "violation of a given norm" can extend to private parties. This suggests the Court assumed ATS claims may be brought against private parties unless the underlying norm supporting the ATS claim could not be brought against private parties.

The availability of redress for war crime victims serves this nation's security and diplomatic interests. This Court should not permit a circuit split among appellate courts to impact an issue of such national and global importance as the proper resolution of the Abu Ghraib war crimes scandal. This Court should grant the writ and conclusively resolve this issue.

II. THIS COURT SHOULD ISSUE THE WRIT TO PREVENT THE JUDICIARY FROM UNILATERALLY OVERTURNING THE CONGRESSIONAL AND EXECUTIVE DECISION NOT TO EXTEND SOVEREIGN IMMUNITY TO CONTRACTORS.

Congress and the Executive have not immunized from tort liability corporate defense contractors who are supporting ongoing military operations abroad in Iraq and Afghanistan. Congress expressly excluded such contractors from the scope of the immunities reserved by the Federal Tort Claims Act ("FTCA"). The Executive promulgated regulations and adopted policies that relied on tort liability as a tool to deter

misconduct by defense contractors deployed in war zones. The majority's creation of a novel "battle-field preemption" doctrine, which immunizes from tort liability corporate defense contractors supporting the military in Iraq and Afghanistan, has intruded on the constitutional prerogatives exercised by these other branches.

The majority reasoned that "the very purposes of tort law are in conflict with the pursuit of warfare" and coined the term "battle-field preemption" to describe its holding. App. 16. The scope and impact of this new doctrine is staggering. Under the majority's test, contractors do *not* need to show that the military placed the employees in the military chain of command, or otherwise authorized the wrongful actions of contractor employees – a showing Respondents could not make. All that has to be shown is that contractor employees "were subject to military direction, even if not subject to normal military discipline." App. 13. This covers all contractor employees supporting the military in Iraq and Afghanistan, as all were subject to some form of military direction by virtue of being contracted to work with the military. *See* App. 167-68 (Department of Defense procurement regulation states that contractor personnel accompanying the armed forces must comply with instructions from the Combatant Commander, and the government may require the contractor to remove any employee who fails to follow military instructions.)

According to the military's Central Command, by September 2009, there were 113,731 contractor

employees in Iraq and 104,101 contractor employees in Afghanistan, compared to troop levels of 130,000 and 63,950 respectively. The corporations contractually responsible for overseeing and supervising these 217,832 contractor employees receive more than *five billion* dollars *per year* from the United States treasury. The majority decision places these 217,832 employees outside this nation's "legal system that in the 'ordinary course . . . provide[s] a remedy for those who were wrongfully injured.'" App. 66. Indeed, these corporate employees now have "*more* protection than our soldiers and other government employees receive." App. 61 (emphasis in original.)[8]

This Court should review this novel judicially-created "battle-field preemption" theory for three reasons: *First*, the majority fails to follow the "limiting principles" set forth in *Boyle v. United Technologies*, and fails to identify any direct conflict between the defendants' state and federal duties. *Second*, the majority's judicial overreaching contravenes the Constitution both on federalism and separation of powers grounds (U.S. Const. art. I, §7, cls. 2-3; art. VI, cl. 2; amend. X), and violates controlling Supreme Court preemption jurisprudence, including *Wyeth v. Levine*, 129 S.Ct. at 1206-08. *Third*, the majority failed to

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[8] The extensive litigation created by the uncertain legal posture of defense contractors accompanying the force is yet another reason for this Court to issue the writ. *See, e.g.*, the petition for the writ submitted regarding *Carmichael v. Kellogg, Brown & Root Service, Inc.*, 572 F.3d 1271 (11th Cir. 2009).

give due deference to Congressional and Executive decisions to use the existing tort law system as a tool to deter misconduct by contractors.

A. The Majority Fails To Follow *Boyle v. United Technologies.*

The majority opinion's creation of "battle-field preemption" failed to adhere to the Court's *Boyle v. United Technologies Corp.* decision. There, the Court held that the discretionary function exception to the FTCA, 28 U.S.C. §2680(a), preempted state law tort suits against military contractors if and only if "a significant conflict exists between an identifiable federal policy or interest and the [operation] of state law, or the application of state law would frustrate specific objectives of federal legislation." *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 (1988) (internal citations and quotation marks omitted.)

The Court identified three factual scenarios when a direct conflict between the federal policy interests and the application of state legal standards could not be found. Those are when the facts reveal (1) that the federal contractor's tortious acts breached its federal duties (either statutory or contractual), (2) that the federal contractor could comply with both its contractual obligations and the state prescribed duty of care because those duties were identical, and (3) in "an intermediate situation, in which the duty sought to be imposed on the contractor is not identical to one assumed under the contract, but is also not contrary

to any assumed." *Boyle* at 509. The Court cautioned that if the facts fit within one of these three scenarios, the contractor cannot invoke the government contractor defense to preempt state tort claims. *Id.*

The Court held that contractors may invoke the judicially-created defense ***only*** when "the state-imposed duty of care that is the asserted basis of the contractor's liability . . . is ***precisely contrary*** to the duty imposed by the Government contract . . . " *Id.* The Court cautioned that even in those instances, preemption is not automatic because it would be unreasonable to say that there is always a "***significant*** conflict" between the state law and a federal policy. Instead, the Court found on the facts before it that the defense could be invoked because imposing tort liability laws for design defects on a government contractor that manufactured military equipment pursuant to reasonably precise specifications from the United States created a significant conflict with federal interests. However, even in the face of this significant conflict, the Court added an additional requirement: the contractor must have warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.[9] *Id.*

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[9] *Boyle* has been extended outside the military procurement context by some circuits. *See, e.g., Hudgens v. Bell Helicopters*, 328 F.3d 1329, 1345 (11th Cir. 2003).

Until the majority's decision, federal circuit courts who have been asked by contractors to apply the government contractor defense have refused to do so if defendant failed to establish a *direct* conflict between its contractual duties and the duties imposed by state tort laws. For example, in *Malesko v. Correctional Svcs. Corp.*, 229 F.3d 374 (2nd Cir. 2000) (*rev'd on other grounds*, *Correctional Svcs. Corp. v. Malesko*, 122 S.Ct. 515 (2001)), an inmate at a federal "halfway house" sued the government contractor that operated that facility for allegedly violating his constitutional rights and causing him to suffer a heart attack by forbidding him from using the elevator to reach his fifth-floor room, and failing to refill his heart medication prescription. The Second Circuit held that the contractor could not invoke the defense because "[s]tripped to its essentials, the government contractor defense is to claim, 'The Government made me do it,'" and there was no evidence "that the government played any role in formulating or approving" the policies that led to the plaintiff's heart attack. *Malesko*, 229 F.3d at 382 (quoting *In re Joint E. & S. Dist. New York Asbestos Litig.*, 897 F.2d 626, 632 (2d Cir. 1990) (internal quotes and cites omitted.) This Court affirmed that the government contractor defense applied only "[w]here the government has directed a contractor to do the very thing that is the subject of the claim. . . . The record here would provide no basis for such a defense." *Correctional Svcs. Corp. v. Malesko*, 122 S.Ct. at 523, n.6. *See also Dorse v. Eagle-Picher Industries, Inc.*, 898 F.2d 1487

(11th Cir. 1990); *In re Hawaii Asbestos Cases*, 960 F.2d 806, 813 (9th Cir. 1992).

As noted by the dissent, "*Boyle* ha[d] never been applied to protect a contractor from liability resulting from the contractor's violation of federal law and policy." App. 52. The discretionary function exception to FTCA does not even bar suits *against the United States* for tortious conduct that violates binding federal law. *See, e.g., Berkovitz v. United States*, 108 S.Ct. 1954, 1958-59 (1988) (holding that "the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive.")

Given that Respondents CACI and Titan were legally and contractually required to refrain from abusing detainees,[10] and that CACI and Titan

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[10] The military regulations that governed interrogation in Iraq incorporate the Geneva Conventions, and prohibit any abuse of detainees. App. 160-61. Petitioners' allegations set forth conduct that, if established at trial, would violate Article 147 of the Fourth Geneva Convention, which defines "grave breaches" of the Convention to include torture, murder, "inhuman treatment," and "willfully causing great suffering or serious injury to body or to health." App. 159. The Fourth Geneva Convention prohibits civilian detainees from being subjected to any "acts of violence and threats thereof," or any "measure of brutality whether applied by civilian or military agents." App. 156-57. The Convention forbids "[a]ny measures of such character as to cause the physical suffering" of civilian internees. App. 157.

provided no evidence that the United States authorized or approved their employees' violation of these legal and contractual duties, it was impossible for the majority to identify an actual conflict as required by *Boyle*. CACI and Titan were not prevented from complying with their contracts by imposition of state law standards, and they could have complied with federal law and contract without breaching any state tort standards. Forcing CACI and Titan to abide by tort law duties preventing them from beating and sexually assaulting defenseless civilian detainees would have promoted, not interfered with, legal and contractual compliance. Thus, the majority failed to follow *Boyle* when it immunized the contractor misconduct at Abu Ghraib prison, the very conduct that shamed this nation.

B. The Majority's "Battle-Field Preemption" Doctrine Fails To Adhere to the Constitution and Supreme Court Preemption Jurisprudence.

Instead of following *Boyle*, and identifying a direct conflict between state tort law and the defendants' contractual obligations, the majority held that there is a "per se" conflict because "the very purposes of tort law are in conflict with the pursuit of warfare." App. 16. The majority found "even in the absence of *Boyle* the plaintiffs' claims would be preempted . . . [because] states . . . constitutionally and traditionally have no involvement in federal wartime policy-making." App. 25. The majority found

Congress occupied the field and impliedly preempted any and all tort claims against contractors supporting the military in Iraq and Afghanistan. The majority cited as evidence Congress occupied the field: (1) the FTCA's combatant activities exception to the United States' waiver of sovereign immunity, and (2) the Constitution's delegation of foreign affairs and war making powers to the federal government.

The majority failed to follow this Court's recent affirmation that "the historic police powers of the State were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress," particularly in a field that States have traditionally occupied. *Wyeth v. Levine*, 129 S.Ct. 1187, 1194-95 (2009), quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). The presumption against preemption is grounded in fundamental Constitutional law principles. *See Wyeth*, 129 S.Ct. at 1206-08 (Thomas, J., concurring in judgment); U.S. Const. art. I, §7, cls. 2-3; art. VI, cl. 2; amend. X. Our structure of government requires that the Federal Government demonstrate "respect for the States as 'independent sovereigns in our federal system' [which] leads [the Court] to assume that 'Congress does not cavalierly pre-empt state-law causes of action.'" *Wyeth*, 129 S.Ct. at 1195, n.3, quoting *Medtronic, Inc.*, 518 U.S. at 485.

1. The FTCA Combatant Activities Exception Does Not Occupy the Field Regarding Private Parties' Tort Liability.

"Implied pre-emption doctrines that wander far from the statutory text are inconsistent with the Constitution." *Wyeth*, 129 S.Ct. at 1205-06 (Thomas, J., concurring in judgment). Such wandering is found in the majority's FTCA holding. Indeed, the majority simply "reads into the Act something that is not there." *United States v. Olson*, 126 S.Ct. 510, 512 (2005).

That is, the majority reads the FTCA's "combatant activities" exception, 28 U.S.C. §2680(j), as a Congressional expression of a policy to eliminate tort from the battlefield, stating "the policy embodied by the combatant activities exception is simply the elimination of tort from the battlefield." App. 15. The Court found "the policies of the combatant activities exception are equally implicated whether the alleged tortfeasor is a soldier or a contractor engaging in combatant activities at the behest of the military and under the military's control." *Id.*

As the dissent explained, however, Congress expressly excluded contractors from the FTCA. The FTCA applies only to civil claims against the United States for injuries "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. §1346(b)(1), App. 141. The

statute excludes contractors from its scope. 28 U.S.C. §2671 ("the term 'Federal agency' . . . *does not include any contractor* with the United States.") (emphasis added.) As the dissent held, "it is not plain that the FTCA's policy is to eliminate liability when the alleged tortfeasor is a contractor rather than a soldier. That, after all, is *not* what the FTCA says." App. 60 (citing *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991)). A provision of a statute that by its own terms does not apply to contractors cannot "occupy the field" regarding contractors' liability in wartime.

Field preemption occurs only when there is "a scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or when Congress acts in "a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Here, Congress cannot be reasonably inferred to have "occupied" a field (government contractors' tort liability) that it expressly declined to enter. *C.f. Hines v. Davidowitz*, 312 U.S. 52, 55-57 (1941) (holding that "where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal

law, or enforce additional or auxiliary regulations"); *Pennsylvania v. Nelson*, 350 U.S. 497, 500 (1956) (holding that federal anti-sedition statute preempts state law, but notes that "the decision in this case does not affect the right of States to enforce their sedition laws at times when the Federal Government has not occupied the field and is not protecting the entire country from seditious conduct.")

The FTCA does not even protect government employees, let alone government contractors, from tort liability. Congress passed a separate statute, the Westfall Act, to protect government employees from tort liability. That Act also excludes government contractors from its scope. The Westfall Act permits government employees to enjoin the United States immunities if, and only if, the Attorney General certifies that the employees acted within the scope of his office or employment. 28 U.S.C. §2679(d)(1), App. 143-44. Neither CACI nor Titan sought Westfall certification.

The majority ignores Congressional intent evidenced in the Westfall Act by bestowing on CACI and Titan an immunity that exceeds the conditional immunity available to government employees and soldiers who are able to establish that they acted within the scope of their employment. *See Wyeth*, 129 S.Ct. at 1199 (disregarding "an untenable interpretation of congressional intent"). As support for its reasoning, the majority cites *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992), in which the Ninth Circuit relied on the FTCA combatant activities exception to

preempt claims against a government contractor. The facts there involved a compliant contractor, and a mistake made by the military itself, not by the contractor. The contractor did not engage in any wrongdoing, and complied with the terms of the government contract. However, the U.S. Navy used a weapons system built by the contractor when it mistakenly shot down an Iranian civilian aircraft. The Court found permitting tort claims to proceed would unduly burden the military, which had acted mistakenly but not wrongfully. The Court commented there is "no duty of reasonable care is owed to those against whom force is directed as a result of *authorized* military action." *Koohi*, 976 F.2d at 1337 (9th Cir. 1992) (emphasis added.)

The court's reasoning in *Koohi* was premised on the military as the actor, and acting in a lawful and authorized fashion by "firing a missile in perceived self-defense," which is "a quintessential combatant activity." 976 F.2d at 1333 n.5. Here, Petitioners' claims are premised on contractor misconduct that is prohibited by contract and law. The court in *Koohi* did not reason that the combatant activities exception "occupied the field" regarding contractors' liability, nor did it abandon *Boyle*'s fundamental requirement of a conflict between contractors' state and federal duties. Rather, the Ninth Circuit identified a direct conflict between applying tort liability standards and the military's ability to contract for the manufacture of weaponry.

In contrast, CACI and Titan employees were not combatants, and were prohibited from participating in combat in any way by the terms of the federal contract. Torturing unarmed civilians detained in a prison outside the battlefield is not combat.[11] As the Fourth Circuit stated in *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009), upholding a CIA contractor's conviction for fatally assaulting an Afghan prisoner,

> [n]o true "battlefield interrogation" took place here; rather, Passaro administered a beating in a detention cell. . . . To accept [Passaro's] argument would equate a violent and unauthorized "interrogation" of a bound and guarded man with permissible battlefield conduct. To do so would ignore the high standards to which this country holds its military personnel.

Id. at 218. *See also Al Shimari v. CACI Premier Technology*, 657 F. Supp. 2d 700, 720 (E.D.Va. 2009) (noting that "unlike soldiers engaging in actual combat, the amount of physical contact available to civilian interrogators against captive detainees in a secure prison facility is largely limited by law, and, allegedly, by contract"). *C.f. Johnson v. United States*, 170 F.2d 770 (9th Cir. 1948).

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[11] Contrary to the majority's assumption, detention centers are not synonymous with "the battlefield." Indeed, detention centers or prisons have to be kept outside "the battlefield" under Article 83 of the Fourth Geneva Convention. App. 158 ("The Detaining Power shall not set up places of internment in areas particularly exposed to the dangers of war.")

2. The Constitutional Delegation of Power Over War Making and Foreign Affairs to the Federal Government Does Not Provide a Basis for Immunizing Contractors from Tort Suit.

The majority relies on the Constitutional delegation of foreign affairs and war making power to the federal government as an independent basis for its "battle-field preemption." *See* Article I, §10 of the U.S. Constitution (prohibiting States from raising armies and going to war, and entering into agreements with a foreign power). Unlike every implied preemption case based on the federal foreign affairs power that has come before this Court, however, the majority did not preempt a specific state law intruding on foreign policy or war making, but rather preempted the *entire body of common tort law*. Asking the federal judiciary to apply facially-neutral, common-law tort rules to CACI and Titan does not constitute the states becoming involved in "federal wartime policy-making" as is claimed by the majority. App. 25. The state laws at issue are common law torts, not state legislative initiatives designed to control the Executive's conduct. As the dissent notes, "no precedent has employed a foreign policy analysis to preempt generally applicable state laws." App. 57. *See also* Jack Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1711 (1997).

The majority's "battle-field preemption" amounts to nothing short of full immunity for all contractors

supporting the military during a time of war. The majority relies on *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003) and *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000). But in those cases, this Court struck down state legislation that directly challenged and conflicted with a clearly ascertainable, published federal law or agreement with a foreign sovereign. *See Garamendi*, 539 U.S. at 408-09 (preempting state legislation designed to force payment by defaulting insurers to Holocaust survivors in a manner contrary to an executive agreement); *Crosby*, 530 U.S. at 367 (preempting state law placing sanctions on doing business with Burma in excess of limitations enacted in federal statute).

These targeted state legislative forays into policymaking that threatened to disrupt relations with foreign sovereigns are not comparable to the body of common law tort at issue here. In *Garamendi*, for example, the Court noted the state law was "quite unlike a generally applicable 'blue sky' law," *id.* at 425, such as a generally applicable tort law. As the dissent noted, App. 58, the Court has sharply limited preemption of state laws in the area of foreign affairs, characterizing *Garamendi* as nothing more than a "claims-settlement case[ ] involv[ing] a narrow set of circumstances," *Medellin v. Texas*, 552 U.S. 491, 531 (2008).

The majority ignored precedents from this Court permitting claims arising during war to proceed under common law torts. *See, e.g., Mitchell v. Harmony*,

54 U.S. 115 (1851) (U.S. soldier may be sued for trespass for wrongfully seizing a citizen's goods while in Mexico during the Mexican War); *Ford v. Surget*, 97 U.S. 594 (1878) (soldier was not exempt from civil liability for trespass and destruction of cattle if his act violated the usages of civilized warfare); *The Paquete Habana*, 175 U.S. 677 (1900) (Court imposed damages for seizure of fishing vessels during a military operation).

The majority also ignored the fact that the Executive recently reaffirmed the use of the existing system of tort liability as one mechanism to deter misconduct from its hundreds of thousands of contractors and their employees who are supporting military operations in Iraq and Afghanistan. The reality is a far cry from the majority's attempt to suggest that military policy is being subjected to "fifty-one separate sovereigns."

First, Petitioners are not suing the military; they are suing CACI and Titan for conduct that the military did not authorize. Second, this Court has repeatedly recognized that state tort *remedies* may be useful to further federal standards of care. In *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984), in which this Court held "[f]ederal preemption of the standards of care can coexist with state and territorial tort remedies," and found that although the federal government had occupied the field of nuclear safety regulation, the federal government's "exclusive authority to set safety standards did not foreclose the use of state tort remedies" for those injured in nuclear

incidents. *Silkwood*, 464 U.S. at 253. The Court affirmed this holding in *Medtronic, Inc. v. Lohr*, 518 U.S. 496 (1996), holding that a statutory preemption clause did not deny states "the right to provide a traditional damages remedy for violations of common law duties when those duties parallel federal requirements." *See id.* at 513 (O'Connor, J., concurring in part and dissenting in part) (state tort claims are not preempted "the extent that they seek damages for [defendant]'s alleged violation of federal requirements"). *See also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 519 (1992) (stating that "there is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common-law damages actions."); *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 375 (3rd Cir. 1999).

This Court noted in *Silkwood* that its conclusion was reinforced by "Congress' failure to provide any federal remedy for persons injured" as a result of violations of federal safety standards, because "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." 464 U.S. at 251. In cases where this Court has found preemption, it "does not normally preempt state law and simply leave the field vacant. Instead, it substitutes a federal common law regime." App. 73, citing *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943). *See also Miree v. DeKalb County*, 433 U.S. 25, 32 (1977) (permitting private lawsuits premised on defendants'

breach of duties to the federal government, and noting that "such lawsuits might be thought to advance federal aviation policy by inducing compliance with FAA safety provisions.")[12]

C. The Majority Prevents the Military from Relying on Existing Tort Law Liability as a Deterrent To Prevent Contractor Misconduct.

Finally, this Court should issue the writ because the majority improperly substituted their policy preferences for the policy choices made by the military. It

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[12] The majority's "battle-field preemption" theory would prevent the application of federal common law, because the majority claims preemption even of international law, which would be the source of the applicable federal common law. *But see Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004) ("[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations"); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (noting that "it is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances"); *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination"); *The Nereide*, 9 Cranch 388, 423 (1815) (Marshall, C.J.) ("[T]he Court is bound by the law of nations which is a part of the law of the land"). *See also Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118 (1804) ("[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains.")

is beyond dispute that the judiciary lacks the expertise to decide how best to wage war. Here, the military has promulgated policies and regulations that contradict the judicial view that the "very purposes of tort law are in conflict with the pursuit of warfare." App. 16. In fact, the military uses the existing tort law system as a tool to deter misconduct by its many contractors. Department of Defense regulations explicitly invoke tort liability, warning that "[i]nappropriate use of force could subject a contractor or its subcontractors or employees to prosecution or *civil liability* under the laws of the United States and the host nation." App. 167 (emphasis added.)

The defense contracting industry has tried to persuade the military to adopt the majority's view that the battlefield is no place for tort law. But in 2008, the military rebuffed that effort, and instead reaffirmed the need for tort liability, stating: "The clause *retains the current rule of law, holding contractors accountable for the negligent or willful actions of their employees, officers, and subcontractors. . . .*" The military continued "to the extent that contractors are currently seeking to avoid accountability to third parties for their own actions by raising defenses based on the sovereignty of the United States, this rule should *not* send a signal that would invite courts to shift the risk of loss to innocent third parties." App. 173. (emphasis added.)

The military viewed the existing judicial "government contractor defense" as having limited

application in Iraq and Afghanistan, where the majority of contracts are service contracts: "the public policy rationale behind *Boyle* does not apply when a performance-based statement of work is used in a services contract. . . ." App. 174. CACI's and Titan's contracts are such services contracts using performance-based statements of work. *See CACI* J.A. 323, 353.

The majority did not solicit input from the military before ruling that battlefield needs require preemption of the entirety of our state common law tort system. Instead, the majority found that CACI and Titan employees were integrated into the military chain of command, and therefore subject to battlefield preemption. As the dissent explains, the majority's attempt to distinguish between contractors in the chain of command subject to battlefield preemption, and contractors outside the chain of command not subject to preemption fails because the Department of Defense's "position is that contractors are *not* within the military chain of command." (emphasis in original) App. 63. *See* App. 76 (corporations required to supervise their employees; corporate employees are "not under the direct supervision of military personnel in the chain of command"); App. 77 ("Management of contractor activities is accomplished through the responsible contracting organization, not the chain of command. Commanders do not have direct control over contractors or their employees"); App. 77-78 ("Maintaining discipline of contractor employees is the *responsibility of the contractor's*

management structure, not the military chain of command. . . . It is the contractor who must take direct responsibility and action for his employee's conduct."); App. 78 (stating that "[c]ontract employees are disciplined by the contractor" and that "[c]ommanders have no penal authority to compel contractor personnel to perform their duties"). The military's own investigations of the contractors' misconduct at Abu Ghraib expressly found that CACI interrogators were not in the military chain of command. CACI JA 464-65 (*See also* Vice Adm. Albert T. Church, Review of Department of Defense Interrogation Operations (2005) at 311 ("the relationship between a contract interrogator and military intelligence leadership is not a direct one. If there is any disagreement regarding quality of work or interpretation of the contract's terms, the dispute must be mediated by the contracting officer (or his or her officially designated on-site representative) and the senior contractor employee present.") The majority also ignored the district court's findings of fact that CACI employees were supervised by CACI's own site manager at Abu Ghraib, who had the full authority to forbid, at pain of termination, CACI employees from carrying out interrogations that violated the law or CACI's code of ethics. App. 99-101.

The majority's finding that civilian contractors are within the military chain of command conflicts with this Court's recognition in *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) that "[t]he military constitutes a specialized community governed by a separate

discipline from that of the civilian." *See also United States v. Brown*, 348 U.S. 110, 112 (1954); *Parker v. Levy*, 417 U.S. 733, 743 (1974); *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975); *Chappell v. Wallace*, 462 U.S. 296, 300 (1983). *See also McMahon v. Presidential Airways*, 502 F.3d 1331, 1348 (11th Cir. 2007) (noting that "a private contractor is not in the chain of command.")

The majority should be reversed because it failed to defer to the military's policy choice to place corporate employees outside the chain of command, and adopted the very immunity the military refused to adopt. The majority ignored the findings of fact made by the military and the district court on corporate employees being outside the military chain of command. The majority, by adopting the "battlefield preemption" doctrine, forced the military to integrate corporate employees into the military chain of command when the military has made a valid policy decision not to do so. Corporations sending employees to Iraq or Afghanistan likely will cease providing supervision, as their legal exposures arising from employee misconduct have been eliminated by the majority's "battlefield preemption." This Court needs to review the majority's decision in order to prevent policy-making by the judicial branch that greatly burdens the military by shifting the duty to supervise more than 200,000 contractor employees from the contractors to the military.

CONCLUSION

This Court should issue the writ. The majority created a circuit split on the critical issue of whether victims of torture and other war crimes may proceed against private parties. The majority created a novel "battle-field preemption" that failed to adhere to the limitations set forth in *Boyle*, and ignored the preemption jurisprudence culminating in *Wyeth*. The majority's "battle-field preemption" created significant practical problems, as it exempted more than 200,000 corporate employees into the chain of command over the objection of the military and in contradiction to *Orloff, Brown, Parker, Schlesinger* and *Chappell*. This Court should issue the writ and prevent such judicial activism from overruling a rational military choice to use existing tort liability as one tool to deter corporate misconduct.

Respectfully submitted,

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United States Court of Appeals,
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 10, 2009
Decided September 11, 2009

No. 08-7008

HAIDAR MUHSIN SALEH, ET AL.,
APPELLANTS

v.

TITAN CORPORATION,
APPELLEE

CACI INTERNATIONAL INC. AND
CACI PREMIER TECHNOLOGY, INC.,
INTERVENORS.

Consolidated with 08-7009

Appeals from the United States District Court
for the District of Columbia
(No. 05cv01165)

Susan L. Burke argued the cause for appellants. With her on the briefs were *Katherine Gallagher*, *Shereef Hadi Akeel*, and *L. Palmer Foret*.

Ari S. Zymelman argued the cause for appellee. With him on the brief were *F. Whitten Peters*, *Kannon K. Shanmugam*, and *F. Greg Bowman*.

J. William Koegel Jr. argued the cause for intervenors CACI International Inc. and CACI Premier Technology, Inc. With him on the brief was *John F. O'Connor*.

Before: GARLAND and KAVANAUGH, *Circuit Judges*, and SILBERMAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* SILBERMAN.

Dissenting opinion filed by *Circuit Judge* GARLAND.

SILBERMAN, *Senior Circuit Judge*: Plaintiff Iraqi nationals brought separate suits against two private military contractors that provided services to the U.S. government at the Abu Ghraib military prison during the war in Iraq. The district court granted summary judgment in behalf of one of the contractors, Titan Corp., on grounds that the plaintiffs' state tort claims were federally preempted. But the court denied summary judgment on those grounds to the other contractor, CACI International Inc. The court also dismissed claims both sets of plaintiffs made under the Alien Tort Statute (which is appealed only by the Titan plaintiffs) and reserved for further proceedings in the CACI case that contractor's immunity defense. We have jurisdiction over this interlocutory appeal under 28 USC §§ 1291 and 1292(b). We affirm the district court's judgment [o]n behalf of Titan, but reverse as to CACI.

I

Defendants CACI and Titan contracted to provide in Iraq interrogation and interpretation services, respectively, to the U.S. military, which lacked sufficient numbers of trained personnel to undertake these critical wartime tasks. The contractors' employees were combined with military personnel for the purpose of performing the interrogations, and the military retained control over the tactical and strategic parameters of the mission. Two separate groups of plaintiffs, represented by the named plaintiffs Haidar Muhsin Saleh and Ilham Nassir Ibrahim, brought suit alleging that they or their relatives had been abused by employees of the two contractors during their detention and interrogation by the U.S. military at the Abu Ghraib prison complex. While the allegations in the two cases are similar, the Saleh plaintiffs also allege a broad conspiracy between and among CACI, Titan, various civilian officials (including the Secretary and two Undersecretaries of Defense), and a number of military personnel, whereas the Ibrahim plaintiffs allege only that CACI and Titan conspired in the abuse.

As we were told, a number of American servicemen have already been subjected to criminal court-martial proceedings in relation to the events at Abu Ghraib and have been convicted for their respective roles. While the federal government has jurisdiction to pursue criminal charges against the contractors should it deem such action appropriate, *see* 18 U.S.C. §§ 2340A, 2441, 3261, and although extensive

investigations were pursued by the Department of Justice upon referral from the military investigator, no criminal charges eventuated against the contract employees. (Iraqi contract employees are also subject to criminal suit in Iraqi court.) Nor did the government pursue any contractual remedies against either contractor. The U.S. Army Claims Service has confirmed that it will compensate detainees who establish legitimate claims for relief under the Foreign Claims Act, 10 U.S.C. § 2734. Saleh pursued such a route, succeeding in obtaining $5,000 in compensation, despite the fact that the Army's investigation indicated that Saleh was never actually interrogated or abused.

While the terms "torture" and "war crimes" are mentioned throughout plaintiffs' appellate briefs and were used sporadically at oral argument, the factual allegations in the plaintiffs' briefs are in virtually all instances limited to claims of "abuse" or "harm." To be sure, as the dissent emphasizes, certain allegations in the complaints are a good deal more dramatic. But after discovery and the summary judgment proceeding, for whatever reason, plaintiffs did not refer to those allegations in their briefs on appeal. Indeed, no accusation of "torture" or specific "war crimes" is made against Titan interpreters in the briefs before us. We are entitled, therefore to take the plaintiffs' cases as they present them to us. And although, for purpose of this appeal, we must credit plaintiffs' allegations of detainee abuse, defendants point out – and it is undisputed – that government investigations

into the activities of the apparently relevant Titan employees John Israel and Adel Nakhla suggest that these individuals were not involved in detainee abuse at all. Other linguists mentioned in plaintiffs' briefs – "Iraqi Mike," Etaf Mheisen, and Hamza Elsherbiny – are not alleged to have engaged in abuse involving the plaintiffs. Steven Stefanowicz, alleged in one set of complaints to have been an employee of Titan, was in fact an employee of CACI. And only one specified instance of activity that would arguably fit the definition of torture (or possibly war crimes) is alleged with respect to the actions of a CACI employee. *Titan* J.A. 567-570.[1]

Plaintiffs brought a panoply of claims, including under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, the Racketeer Influenced and Corrupt Organizations

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[1] The Torture Victim Protection Act, § 3(b)(1), 28 U.S.C. § 1350, defines "torture" as "any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual *for such purposes* as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind." (emphasis added) *See Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 91-94 (D.C. Cir. 2002). There is an allegation that one of *CACI*'s employees observed and encouraged the beating of a detainee's soles with a rubber hose, which could well constitute torture or a war crime.

Act, 18 U.S.C. § 1961 *et seq.*, government contracting laws, various international laws and agreements, and common law tort. In a thoughtful opinion, District Judge Robertson dismissed all of the Ibrahim plaintiffs' claims except those for assault and battery, wrongful death and survival, intentional infliction of emotional distress, and negligence. *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10 (D.D.C. 2005). Following our decisions in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (Edwards, J., concurring), and *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), the district court held that because there is no consensus that *private* acts of torture violate the law of nations, such acts are not actionable under the ATS's grant of jurisdiction. *Ibrahim*, 391 F. Supp. 2d at 14-15.[2]

As for the remaining claims, the district court found that there was, as yet, insufficient factual support to sustain the application of the preemption defense, which the defendants had asserted. The judge ordered limited discovery regarding the military's supervision of the contract employees as well as the degree to which such employees were integrated into the military chain of command. *Id.* at 19. A year later, the district court dismissed the federal claims of the Saleh plaintiffs. *Saleh v. Titan Corp.*, 436 F. Supp. 2d

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[2] The ATS reads, in its entirety, "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

55 (D.D.C. 2006). The two sets of cases were consolidated for discovery purposes.

Following discovery, the contractors filed for summary judgment, again asserting that all remaining claims against them should be preempted as claims against civilian contractors providing services to the military in a combat context. In the absence of controlling authority, the district judge fashioned a test of first impression, according to which this preemption defense attaches only where contract employees are "under the direct command and *exclusive* operational control of the military chain of command." *Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1, 5 (D.D.C. 2007) (emphasis added). He concluded that Titan's employees were "fully integrated into [their] military units," *id.* at 10, essentially functioning "as soldiers in all but name," *id.* at 3. Although CACI employees were also integrated with military personnel and were within the chain of command, they were nevertheless found to be subject to a "dual chain of command" because the company retained the power to give "advice and feedback" to its employees and because interrogators were instructed to report abuses up both the company and military chains of command. *Id.* The CACI site manager, moreover, said that he had authority to prohibit interrogations inconsistent with the company ethics policy, which the district court deemed to be evidence of "dual oversight." *Id.* Thus the remaining tort claims were held preempted as to Titan but not as to CACI. *Id.*

The losing party in each case appealed, and we heard their arguments jointly. We thus have before us two sets of appeals. The first consists of the Iraqi plaintiffs' appeals from the district court's decision in favor of Titan on both the preemption and ATS issues. The second features CACI's appeals from the district court's denial of its motion for summary judgment on the basis of preemption. We have jurisdiction pursuant to 28 U.S.C. § 1291 over the former. As to the latter, the district court has certified its denial of summary judgment for immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The plaintiffs only half-heartedly object to the district judge's exercise of discretion under § 1292(b). Even if we were inclined to withdraw this permission to appeal – which we are not – we would still be required to rule on the appropriate test for combatant activities preemption in the plaintiffs' appeals against the judgment for Titan. We also have jurisdiction over the district judge's dismissal of the ATS claim in the Titan case, but not his corollary dismissal of the ATS claim in the CACI case; the plaintiffs did not cross-appeal that decision.

We think the district judge properly focused on the chain of command and the degree of integration that, in fact, existed between the military and both contractors' employees rather than the contract terms – and affirm his findings in that regard. We disagree, however, somewhat with the district court's legal test: "exclusive" operational control. That CACI's employees were expected to report to their civilian supervisors,

as well as the military chain of command, any abuses they observed and that the company retained the power to give advice and feedback to its employees, does not, in our view, detract meaningfully from the military's operational control, nor the degree of integration with which CACI's employees were melded into a military mission. We also agree with the district court's disposition of the ATS claim against Titan.

II

We conclude that plaintiffs' D.C. tort law claims are preempted for either of two alternative reasons: (a) the Supreme Court's decision in *Boyle*; and (b) the Court's other preemption precedents in the national security and foreign policy field.

* * *

Although both defendants assert that they meet the district court's "direct command and exclusive operational control" test for application of the preemption defense, CACI disputes the appropriateness of that test, arguing that it does not adequately protect the federal interest implicated by combatant activities. In CACI's view, the wartime interests of the federal government are as frustrated when a contractor within the chain of command exercises *some* level of operational control over combatant activities as would be true if all possible operational influence is exclusively in the hands of the military. For their part, the Iraqi plaintiffs agree with the

district court's finding that CACI exerted sufficient operational control over its employees as to have been able to prevent the alleged prisoner abuse and thus that the company should be subject to suit. As to Titan, plaintiffs argue that the district court overlooked critical material facts, including allegations that Titan breached its contract and that the military lacked the authority to discipline Titan employees.

As noted, both defendants asserted a defense based on sovereign immunity, which the district court has reserved. Presumably, they would argue that, notwithstanding the exclusion of "contractors with the United States" from the definition of "Federal agency" in the Federal Tort Claims Act ("FTCA") – which, of course, waives sovereign immunity – when a contractor's individual employees under a service contract are integrated into a military operational mission, the contractor should be regarded as an extension of the military for immunity purposes. The Supreme Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), the primary case on which defendants rely for their preemption claim, reserved the question whether sovereign immunity could be extended to nongovernmental employees, *id.* at 505 n.1, even in a case where the contractor provided a discrete product to the military.

We agree with the defendants (and the district judge) that plaintiffs' common law tort claims are controlled by *Boyle*. There, a lawsuit under Virginia tort law was brought in federal district court in behalf of a Marine pilot who was killed when his helicopter

crashed into the water and he was unable to open the escape hatch (which opened out rather than in). The defendant that manufactured the helicopter alleged that the door was provided in accordance with Department of Defense specifications and, therefore, Virginia tort law was preempted. The Supreme Court agreed; it reasoned that first "uniquely federal interests" were implicated in the procurement of military equipment by the United States, and once that was recognized, a conflict with state law need not be as acute as would be true if the federal government was legislating in an area traditionally occupied by the states.

Nevertheless, the court acknowledged that a significant conflict must exist for state law to be preempted. In *Boyle,* the court observed that the contractor could not satisfy both the government's procurement design and the state's prescribed duty of care. It looked to the FTCA's exemption to the waiver of sovereign immunity for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the Government, whether or not the discretion involved be abused," 28 U.S.C. § 2680(a), to find a statutory provision that articulated the "outlines" of the significant conflict between federal interests and state law. *Boyle,* 487 U.S. at 511. Since the selection of the appropriate design of military equipment was obviously a governmental discretionary function and a lawsuit against a contractor that conformed to that design would

impose the same costs on the government indirectly that the governmental immunity would avoid, the conflict is created.

The crucial point is that the court looked to the FTCA exceptions to the waiver of sovereign immunity to determine that the conflict was significant and to measure the boundaries of the conflict. Our dissenting colleague contends repeatedly that the FTCA is irrelevant because it specifically excludes government contractors. *See* Dissent Op. at 8, 15-16, 19. But, in that regard, our colleague is not just dissenting from our opinion, he is quarreling with *Boyle* where it was similarly argued that the FTCA could not be a basis for preemption of a suit against contractors. *See* Supplemental Brief of Petitioner at 10-11, 1988 WL 1026235; *see also* 487 U.S. at 526-27 (Brennan, J., dissenting). In our case, the relevant exception to the FTCA's waiver of sovereign immunity is the provision excepting "any claim arising out of the combatant activities of the military or armed forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j).[3] We note that this exception is even broader than the discretionary function exception. In the latter situation, to find a conflict, one must discover a discrete

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[3] Although the combatant activities exception was the only FTCA exception briefed, it was suggested at oral argument that other provisions could conceivably conflict with the plaintiffs' claims, potentially including 28 U.S.C. § 2680(k) (exempting from the immunity waiver "any claim arising in a foreign country"). Of course, since that issue has not been properly raised, we do not reach it.

discretionary governmental decision, which precludes suits based on that decision, but the former is more like a field preemption, *see, e.g., Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943), because it casts an immunity net over any claim that *arises* out of combat activities. The arising-out-of test is a familiar one used in workmen's compensation statutes to denote *any* causal connection between the term of employment and the injury.[4]

The parties do not seriously dispute the proposition that uniquely federal interests are implicated in these cases, nor do the plaintiffs contend that the detention of enemy combatants is not included within the phrase "combat activities." Moreover, although the parties dispute the degree to which the contract employees were integrated into the military's operational activities, there is no dispute that they were in fact integrated and performing a common mission with the military under ultimate military command. They were subject to military direction, even if not subject to normal military discipline. Instead, the plaintiffs argue that there is not a significant conflict

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[4] *See, e.g., O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507 (1951); *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 615 (1982). In the District of Columbia, scope of employment law is expansive enough "to embrace any intentional tort arising out of a dispute that was originally undertaken on the employer's behalf." *Council on American Islamic Relations v. Ballenger*, 444 F.3d 659, 664 (D.C. Cir. 2006) (quoting *Johnson v. Weinberg*, 434 A.2d 404, 409 (D.C. 1981)).

in applying state or Iraqi tort law to the behavior of both contractors' employees because the U.S. government itself openly condemned the behavior of those responsible for abusing detainees at Abu Ghraib – at least the Army personnel involved.

In order to determine whether a significant conflict exists between the federal interests and D.C. tort law, it is necessary to consider the reasons for the combat activities exception. The legislative history of the combatant activities exception is "singularly barren," but it is plain enough that Congress sought to exempt combatant activities because such activities "by their very nature should be free from the hindrance of a possible damage suit." *Johnson v. U.S.*, 170 F.2d 767, 769 (9th Cir. 1948). As the Ninth Circuit has explained, the combatant activities exception was designed "to recognize that during wartime encounters[,] no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action." *Koohi v. U.S.*, 976 F.2d 1328, 1337 (9th Cir. 1992) (holding preempted claims against a defense contractor implicated in the Navy's accidental shoot-down of an Iranian commercial airliner); *see also Ibrahim*, 391 F. Supp. 2d at 18 ("war is an inherently ugly business").

To be sure, to say that tort duties of reasonable care do not apply on the battlefield is not to say that soldiers are not under any legal restraint. Warmaking is subject to numerous proscriptions under federal law and the laws of war. Yet, it is clear that all of the traditional rationales for *tort* law – deterrence of

risk-taking behavior, compensation of victims, and punishment of tortfeasors – are singularly out of place in combat situations, where risk-taking is the rule. *Koohi*, 976 F.2d at 1334-35; *see also, Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1493 (C.D. Cal. 1993). In short, the policy embodied by the combatant activities exception is simply the elimination of tort from the battlefield, both to preempt state or foreign regulation of federal wartime conduct and to free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit. And the policies of the combatant activities exception are equally implicated whether the alleged tortfeasor is a soldier or a contractor engaging in combatant activities at the behest of the military and under the military's control. Indeed, these cases are really indirect challenges to the actions of the U.S. military (direct challenges obviously are precluded by sovereign immunity).

The nature of the conflict in this case is somewhat different from that in *Boyle* – a sharp example of discrete conflict in which satisfying both state and federal duties (*i.e.*, by designing a helicopter hatch that opens both inward and outward) was impossible. In the context of the combatant activities exception, the relevant question is not so much whether the substance of the federal duty is inconsistent with a hypothetical duty imposed by the state or foreign sovereign. Rather, it is the imposition *per se* of the state or foreign tort law that conflicts with the FTCA's policy of eliminating tort concepts from the

battlefield. The very purposes of tort law are in conflict with the pursuit of warfare. Thus, the instant case presents us with a more general conflict preemption, to coin a term, "battle-field preemption": the federal government occupies the field when it comes to warfare, and its interest in combat is always "precisely contrary" to the imposition of a non-federal tort duty. *Boyle*, 487 U.S. at 500.

Be that as it may, there are specific conflicts created if tort suits are permitted. Of course, the costs of imposing tort liability on government contractors is passed through to the American taxpayer, as was recognized in *Boyle*. More important, whether the defendant is the military itself or its contractor, the prospect of military personnel being haled into lengthy and distracting court or deposition proceedings is the same where, as here, contract employees are so inextricably embedded in the military structure. Such proceedings, no doubt, will as often as not devolve into an exercise in finger-pointing between the defendant contractor and the military, requiring extensive judicial probing of the government's wartime policies. Allowance of such suits will surely hamper military flexibility and cost-effectiveness, as contractors may prove reluctant to expose their employees to litigation-prone combat situations.[5]

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[5] The dissent asserts that such conflicts can be ameliorated through a *deus ex machina* of litigation management. Dissent Op. at 25-26. We think that is an illusion.

Further, given the numerous criminal and contractual enforcement options available to the government in responding to the alleged contractor misconduct – which options the government evidently has foregone – allowance of these claims will potentially interfere with the federal government's authority to punish and deter misconduct by its own contractors. *See, e.g., Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 350-53 (2001). And as noted above, the Army Claims Service has confirmed that plaintiffs will not be totally bereft of all remedies for injuries sustained at Abu Ghraib, as they will still retain rights under the Foreign Claims Act. Thus, in light of these alternative remedies, it is simply not accurate to say, as the dissent does, that our decision today leaves the field without any law at all, Dissent Op. at 30-31.

Just as in *Boyle*, however, the "scope of displacement" of the preempted non-federal substantive law must be carefully tailored so as to coincide with the bounds of the federal interest being protected. In that case, the Supreme Court promulgated a three-part test to determine when preemption is required in the design defects context: "Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to these specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Boyle*, 487 U.S. at 512.

This test served to ensure that a "discretionary function" of the government was truly at stake and to eliminate any perverse incentive for a manufacturer to fail to disclose knowledge of potential risks. *Id.* at 512-13. Here, the district court concluded that the federal interest in shielding the military from battlefield damage suits is sufficiently protected if claims against contract employees "under the direct command and exclusive operational control of the military chain of command such that they are functionally serving as soldiers" are preempted. *Ibrahim*, 556 F. Supp. 2d at 5.

We agree with CACI that this "exclusive operational control" test does not protect the full measure of the federal interest embodied in the combatant activities exception. Surely, unique and significant federal interests are implicated in situations where operational control falls short of exclusive. As CACI argues, that a contractor has exerted *some* limited influence over an operation does not undermine the federal interest in immunizing the operation from suit. Indeed, a parallel argument drawn from the Eleventh Circuit for a rule that would preclude suit "only if . . . the contractor did not participate, or participated only minimally, in the design of the defective equipment" was rejected by the Supreme Court in *Boyle* as "not a rule designed to protect the federal interest embodied in the 'discretionary function' exemption." Whether or not the contractors participated in the design of the helicopter door, the government official made the policy judgment, and it

is that judgment that is protected by preemption. 487 U.S. at 513.

The district court's test as applied to CACI and Titan, moreover, creates a powerful (and perverse) economic incentive for contractors, who would obviously be deterred from reporting abuse to military authorities if such reporting alone is taken to be evidence of retained operational control. That would be quite anomalous since even uniformed military personnel are obliged to refuse manifestly unlawful orders, *see United States v. Calley*, 22 U.S.C.M.A. 534, 544 (1973), and, moreover, are encouraged to report such outside of the chain of command to inspector generals, *see, e.g.*, 10 U.S.C. § 1034. Again we see an analogy to *Boyle*. As noted, the Eleventh Circuit would have allowed the contractor a preemption defense only if the contractors did not participate at all in the design of the helicopter door. The Supreme Court pointed out that that test would create an analogous perverse incentive, discouraging contractors from participating in design features where their expertise would help to better the product. *Boyle*, 487 U.S. at 512-13.

We think that the following formulation better secures the federal interests concerned: During wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted. We recognize that a service contractor might be supplying services in such a discrete

manner – perhaps even in a battlefield context – that those services could be judged separate and apart from combat activities of the U.S. military.[6] That would be analogous to the court's recognition in *Boyle* that a supply contractor that had a contract to provide a product without relevant specifications would not be entitled to the preemption defense if its sole discretion, rather than the government's, were challenged (although we are still puzzled at what interest D.C., or any state, would have in extending its tort law onto a foreign battlefield).

We believe, *compare* Dissent Op. at 21-22, our decision is consistent with statements made by the Department of Defense in a rulemaking proceeding after the alleged events in this case in which it stated that "[t]he public policy rationale behind *Boyle* does

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[6] Plaintiffs contend that government contractor preemption should be limited to procurement contracts (as in *Boyle* or *Koohi*) and should not extend to service contracts, as here. While some lower courts have limited preemption in this manner, *see, e.g.*, *McMahon v. Presidential Airways Inc.*, 460 F. Supp. 2d. 1315, 1331 (M.D. Fla. 2006); *Fisher v. Halliburton*, 390 F. Supp. 2d 610, 615 (S.D. Tex. 2005), we agree with the Eleventh Circuit, which has held that the question of preemption *vel non* is not contingent on whether a contract is for goods or services. *Hudgens v. Bell Helicopters*, 328 F.3d 1329, 1345 (11th Cir. 2003) (holding claims that service contractor negligently maintained military helicopters preempted by the discretionary functions exception); *see also, Ibrahim*, 556 F. Supp. 2d at 4 n.3 (following *Hudgens*). Rather, "the question is whether subjecting a contractor to liability under state tort law would create a significant conflict with a unique federal interest." *Hudgens*, 328 F.3d at 1334.

not apply when a *performance-based statement of work* is used in a services contract, because the Government does not, in fact, exercise specific control over the actions and decisions of the contractor. . . ." Contractor Personnel Authorized to Accompany U.S. Armed Forces, 73 Fed. Reg. 16,764, 16,768 (Mar. 31, 2008) (emphasis supplied). Because performance-based statements of work "describe the work in terms of the required results rather than either 'how' the work is to be accomplished or the number of hours to be provided," 48 C.F.R. § 37.602(b)(1), by definition, the military could not retain command authority nor operational control over contractors working on that basis and thus tort suits against such contractors would not be preempted under our holding. Indeed, there is no indication from the department's statements that it considered, much less ruled out, whether tort suits against service contractors working within the military chain of command should be preempted on the basis of the FTCA's "combatant activities" exception.

It is argued that because the executive branch has not chosen to intervene in this suit or file an amicus brief on behalf of defendants, this case differs from *Boyle*. But the government did not participate in *Boyle* below the Supreme Court, which has also been the case in some other proceedings. *See e.g., Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 54 n.9 (1st Cir. 1999), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363; *Davidowitz v. Hines*, 30 F. Supp. 470 (D. Pa. 1939), *aff'd* 312 U.S. 52; *see also*

Zschernig v. Miller, 389 U.S. 429, 443 (1968) (finding Oregon statute preempted even though Solicitor General argued as amicus that application of the statute did not "unduly interfere[] with the United States' conduct of foreign relations" because "the basic allocation of power between the States and the Nation . . . cannot vary from day to day with the shifting winds at the State Department") (Stewart, J. concurring). To be sure, the executive branch has broadly condemned the shameful behavior at Abu Ghraib documented in the now infamous photographs of detainee abuse. This disavowal does not, however, bear upon the issue presented in this tort suit against these defendants. Indeed, the government acted swiftly to institute court-martial proceedings against offending military personnel, but no analogous disciplinary, criminal, or contract proceedings have been so instituted against the defendants. This fact alone indicates the government's perception of the contract employees' role in the Abu Ghraib scandal. In any event, Congress at least has indicated that common law tort suits "arising out of" combatant activities conflict with the very real interests of the military in time of war.

Our holding is also consistent with the Supreme Court's recent decision in *Wyeth v. Levine*, 555 U.S. ___ (2009). In that case, the Court held that federal law did *not* preempt a patient's state law inadequate warning claim against a drug manufacturer, because compliance with both the state and federal duties was not impossible and because the manufacturer's

interpretation of congressional intent was overly broad. The Court cited two "cornerstones" of preemption jurisprudence, both of which helpfully illuminate the distinctions between the instant case and *Wyeth*. *Id.*, slip op. at 8. The first is congressional intent, which, while murky at best in the context of federal drug regulations, is much clearer in the case of the statutory text of the combatant activities exception. *Id.* And the second is the strong presumption against preemption in fields that the states have traditionally occupied but where Congress has legislated nonetheless. *Id.* Unlike tort regulation of dangerous or mislabeled products, the Constitution specifically commits the Nation's war powers to the federal government, and as a result, the states have traditionally played no role in warfare. We think that these "cornerstones" of preemption secure the foundation of our holding.

The federal government's interest in preventing military policy from being subjected to fifty-one separate sovereigns (and that is only counting the *American* sovereigns) is not only broad – it is also obvious. Plaintiffs did not, at the briefing stage, even identify *which* sovereign's substantive common law of tort should apply to their case although at oral argument counsel explained that, in its view, D.C. law applied.[7] Defendants' actions thus were at a

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[7] Our dissenting colleague suggests that plaintiffs are ill-advised to base their tort claims on D.C. law. *See* Dissent Op. at

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minimum potentially subject to the laws of fifty states plus the District of Columbia, perhaps even U.S. overseas dependencies and territories (if detainee counsel's reliance at oral argument on "all law" is to be credited). And as we have pointed out, on appeal plaintiffs rely on general claims of abuse which include assault and battery, negligence, and the intentional infliction of emotional distress. The application of those tort concepts surely differ in 51 jurisdictions. We can also imagine many other causes of action, which vary by jurisdiction, that under the dissent's standard could apply to employees of government contractors on the battlefield such as defamation, invasion of privacy, etc. Indeed, in light of the District's choice of law principles, *see Drs. Groover, Christie & Merritt, P.C. v. Burke,* 917 A.2d 1110, 1117 (D.C. 2007) (applying a "government interests analysis"), it is far from unlikely that the applicable substantive law would be that of Iraq.

The dissent suggests that some jurisdictions' tort laws – which, are not specified – might be selectively preempted, *see* Dissent Op. at 27, but apparently not even "intentional infliction of emotional distress." The dissent's focus on the notoriety of Abu Ghraib and its failure to specify which torts would be preempted runs the risk of fashioning an encroachment with federal interests that is like "a restricted railroad

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28-29. But again, we must take the case plaintiffs bring before us.

ticket, good for this day and train only." *Smith v. Allwright,* 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

* * *

Arguments for preemption of state prerogatives are particularly compelling in times of war. In that regard, even in the absence of *Boyle* the plaintiffs' claims would be preempted. The states (and certainly foreign entities) constitutionally and traditionally have no involvement in federal wartime policy-making. *See* U.S. Const. Art I, § 10; *see also, American Ins. Ass'n v. Garamendi,* 539 U.S. 396, 420 n.11 (2003) ("If a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility, field preemption might be the appropriate doctrine, whether the National Government had acted and, if it had, without reference to the degree of any conflict, the principle having been established that the Constitution entrusts foreign policy exclusively to the National Government."); *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 387-88 (2000) ("A failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply."); *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 447-49 (1979); *Zschernig v. Miller,* 389 U.S. 429 (1968); *Hines v. Davidowitz,* 312 U.S. 52, 63 (1941) ("Our system of government . . . imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."). On the other side of the

balance, the interests of any U.S. state (including the District of Columbia) are *de minimis* in this dispute – all alleged abuse occurred in Iraq against Iraqi citizens. The scope of displacement under our "ultimate military authority" test is thus appropriately broader than either *Boyle*'s discretionary functions test or the rule proposed by the district court. The breadth of displacement must be inversely proportional to state interests, just as it is directly proportional to the strength of the federal interest.

While the dissent suggests that the cases cited above are inapposite because the "preempted state laws conflicted with express congressional or executive policy," Dissent Op. at 16-17, the assertion is simply not accurate.[8] In *Garamendi,* for example, the Supreme Court held that a California statute requiring insurance companies doing business in that

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[8] Neither are we persuaded by our dissenting colleague's suggestion that these cases are of little precedential weight because the state laws in the above cited cases were "specifically targeted at issues concerning the foreign relations of the United States." Dissent Op. at 16. Insofar as this lawsuit pursues contractors integrated within military forces on the battlefield, we believe it similarly interferes with the foreign relations of the United States as well as the President's war making authority. Moreover, contrary to the dissent, it is a black-letter principle of preemption law that generally applicable state laws may conflict with and frustrate the purposes of a federal scheme just as much as a targeted state law. *See Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1008 (2008); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 443 (2005); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (plurality opinion). The Supreme Court's preemption cases thus reject the dissent's attempted distinction.

state to disclose information concerning policies it sold in Europe between 1920 to 1945 was preempted by federal law. 539 U.S. at 401. As the source of preemption, the Court relied on an executive agreement between the United States and Germany. The agreement provided that Germany would form and provide funding for a foundation which would adjudicate Holocaust-era insurance claims. *Id.* at 406. For its part, the United States agreed that, should any plaintiff file a Holocaust-era insurance claim against a German company in U.S. court, the executive would submit a non-binding statement indicating "that U.S. policy interests favor dismissal on any valid legal ground." *Id.* The state and federal law thus posed no express conflict – it would have been entirely possible for insurance companies to disclose information under California's legislation and still benefit from the national government's intervention should suit be filed against them in U.S. courts. Nonetheless, the Supreme Court held that the California statute was preempted because the California statute "employs a different state system of economic pressure and in doing so undercuts the President's diplomatic discretion and choice he has made exercising it." *Id.* at 423-24 (quotation omitted); *see also id.* at 427 ("The basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves."). While the dissent attempts to distinguish *Garamendi* by pointing out that the Supreme Court *characterized* the state statute at issue there as posing a "clear conflict" with federal policy, the same words could be used here.

Similarly, in *Crosby*, the Supreme Court held that a Massachusetts statute prohibiting the state from purchasing goods and services from companies doing business in Burma was preempted by a federal statute that *inter alia* gave the President the power to, upon certain conditions, prohibit United States persons from investing in Burma. 530 U.S. at 367-69. As in *Garamendi*, despite the fact that companies could comply with both state and federal laws, the Court explained that the state statute was preempted because it was "at odds with . . . the federal decision about the right degree of pressure to employ." *Id.* In other words, in both *Crosby* and *Garamendi*, preemption arose not because the state law conflicted with the express provisions of federal law, but because, under the circumstances, the very imposition of *any state law* created a conflict with federal foreign policy interests. Much the same could be said here. Not only are these cases not inapposite, they provide an alternative basis for our holding.[9]

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[9] Even had plaintiffs focused and limited their allegations before us to actual torture, we note that Congress has passed comprehensive legislation dealing with the subject of war crimes, torture, and the conduct of U.S. citizens acting in connection with military activities abroad. Through acts such as the Torture Victim Protection Act, 28 U.S.C. § 1350, the Military Commissions Act, 10 U.S.C. § 948a *et seq.*, the federal criminal torture statute, 18 U.S.C. § 2340-2340A, the War Crimes Act, 18 U.S.C. § 2441, the Foreign Claims Act, 10 U.S.C. § 2734, and the Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq.*, Congress has created an extensive body of law with respect to allegations of torture. But Congress has declined to create a civil tort cause

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We therefore reverse the district court's holding as to CACI and affirm its Titan holding on a broader rationale.

III

It will be recalled that our jurisdiction to entertain the ATS issue extends only to the plaintiffs' appeals against Titan and *not* to CACI's appeals from the district court's denial of its summary judgment motion on preemption grounds. The statute is a simple, if mysterious, one. It states, "the district court shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The Supreme Court recently has wrestled with its meaning and its scope. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Appellants argue that the district court erred in dismissing their claims against Titan under this statute based on their reading of *Sosa*. Titan argues that the district court

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of action that plaintiffs could employ. In the TVPA, for example, Congress provided a cause of action whereby U.S. residents could sue foreign actors for torture, but Congress exempted American government officers and private U.S. persons from the statute. Congress has also adopted criminal statutes that would apply to these defendants had they committed acts of torture, *see* 18 U.S.C. §§ 2340A, 2241, 3261, but Congress has not created a corresponding tort cause of action. Moreover, even in the years since Abu Ghraib, Congress has not enacted a civil cause of action allowing suit for torture, it only has extended the UCMJ to cover military contractors. 10 U.S.C. § 802.

correctly followed our precedents in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (Edwards, J., concurring), and *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), which conclude that the ATS provides a cause of action against states but not private persons and which survive the Supreme Court's analysis in *Sosa*.

The latter case involved a tort claim brought, *inter alia*, against a Mexican national, Sosa, who purportedly acted on the DEA's behalf to abduct a Mexican physician accused of torture and murder and bring him from Mexico to stand trial in the United States. Sosa was acquitted of criminal charges and then brought his suit. The Supreme Court, reversing the Ninth Circuit, held that four DEA agents also named as defendants were immune from suit because of an exception to the FTCA waiver of sovereign immunity for actions in foreign countries.[10] Then it turned to the claim against Sosa under the ATS. Sosa and the U.S. government argued that the ATS was only a jurisdictional grant; it did not create any substantive law, but the Court disagreed, concluding that when the statute was passed by the first Congress as part of the Judiciary Act of 1789, three limited causes of action were contemplated: piracy, infringement of ambassadorial rights, and violation of

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[10] Apparently, Sosa never argued for federal preemption of the claims against him on grounds analogous to the instant case.

safe conduct.[11] And more important for our case, the Court opened the door a crack to the possible recognition of new causes of action under international law (such as, perhaps, torture) if they were firmly grounded on an international consensus. *Sosa*, 542 U.S. at 732-33. The court noted, but declined to decide, the issue which divides us from the Second Circuit, whether a private actor, as opposed to a state, could be liable under the ATS. *Id.* at 733 n.20.

The holding in *Sosa*, however, was to reject the ATS claim that Alvarez was arbitrarily arrested and detained in Mexico in violation of international law because, at the threshold, there was no settled norm of international law bearing on that question that was analogous to the consensus that existed in 1789 with respect to the three concerns that motivated Congress.

Appellants argue that despite the footnote reserving the issue dividing the D.C. and Second Circuits, since the Court went on to analyze whether an ATS cause of action existed against Alvarez, it must have implicitly determined that a private actor could be liable. But that is not persuasive: courts often reserve an issue they don't have to decide because, even

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[11] There is some indication that the thoroughly modern act of aircraft hijacking may also be on this short list of universal concerns. *See, e.g., Kadic v. Karadzic*, 70 F.3d 232, 240 (2d Cir. 1995).

assuming *arguendo* they favor one side, that side loses on another ground.

Plaintiffs rely heavily on the Second Circuit's opinion in *Kadic v. Karàdzic*, 70 F.3d 232, 239 (2d Cir. 1995), which held that for certain categories of action, including genocide, the scope of the law of nations is not confined solely to state action but reaches conduct "whether undertaken by those acting under the auspices of a state or only as private individuals." Despite the apparent breadth of this formulation, it must be remembered that in *Kadic*, the defendant was the self-proclaimed President of the Serbian Republic of Bosnia-Herzegovina, so the holding is not so broad. While Srpska was not yet internationally recognized as a state – thus technically rendering its militia a private entity – a quasi-state entity such as Radovan Karàdzic's militia is easily distinguishable from a private actor such as Titan.

The *Sosa* Court, while opening the door a crack to the expansion of international law norms to be applied under the ATS, expressed the imperative of judicial restraint. It was pointed out that federal courts today – as opposed to colonial times – are and must be reluctant to look to the common law, including international law, in derogation of the acknowledged role of legislatures in making policy. Bearing that caution in mind, and in light of the holding in *Sosa*, we have little difficulty in affirming the district judge's dismissal of the ATS claim against Titan. As we have noted, appellants' claim – as it appeared in their briefs and oral argument before us – is

stunningly broad. They claim that any "abuse" inflicted or supported by Titan's translator employees on plaintiff detainees is condemned by a settled consensus of international law. At oral argument, counsel claimed that included even assault and battery.[12] We think that is an untenable, even absurd, articulation of a supposed consensus of international law. (Indeed, it is doubtful that we can discern a U.S. national standard of treatment of prisoners – short of the Eighth Amendment.) In *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 93-4 (D.C. Cir. 2002), we specifically held that the Libyan police's very rough and abusive handling of American detainees was not a violation of the Torture Victim Protection Act ("TVPA"), § 3(b)(1), 28 U.S.C. § 1350. Although appellants there did not make a claim under the ATS, if their treatment did not violate *American* law, perforce they could not draw upon an international consensus.

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[12] "Court: So, your allegations are broader than torture.

Counsel: Yes. Your Honor, the allegations turn on the physical force whether or not those are labeled definitionally as torture or not doesn't really matter because we're talking about assault and batteries. And so, you know, if for example, you know, something like –

Court: So, assault and battery would be covered by the law of nations, as well. . . . Is that correct?

Counsel: . . . Yes. In this context it would be. . . ."

Assuming, *arguendo*, that appellants had adequately alleged torture (or war crimes), there still remains the question whether they would run afoul of *Sosa*'s comments. Although torture committed by a state is recognized as a violation of a settled international norm, that cannot be said of private actors. *See, e.g., Sanchez-Espinoza*, 770 F.2d at 206-7; *see also*, Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment art. I, para. 1, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85 (limiting definition of torture to acts by "a public official or other person acting in an official capacity"); TVPA, § 2(a), 28 U.S.C. § 1350 (establishing liability exclusively for individuals "under actual or apparent authority, or color of law, of any foreign nation").[13]

Alternatively, it is asserted that defendants, while private parties, acted under the color of law. Although we have not held either way on this variation, in *Tel-Oren*, Judge Edwards' concurring opinion, while not a court holding, suggests that the ATS extends that far. 726 F.2d at 793. And the Supreme Court in *Sosa* implied that it might be significant for Sosa to establish that Alvarez was acting "on behalf of a

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[13] Even if torture suits cannot be brought against private parties – at least not yet – it may be that "war crimes" have a broader reach. Of course, we reiterate that appellants have not brought to our attention any specific allegations of such behavior. Presumably for this reason, when the district court considered appellants' ATS argument, it analyzed only an asserted international law norm against torture, not war crimes.

government." 542 U.S. at 735 (although which government – the U.S. or Mexico – is unclear). Of course, plaintiffs are unwilling to assert that the contractors are state actors. Not only would such an admission make deep inroads against their arguments with respect to the preemption defense, it would virtually concede that the contractors have sovereign immunity. Thus, as the district court recognized, appellants are caught between Scylla and Charybdis: they cannot artfully allege that the contractors acted under color of law for jurisdictional purposes while maintaining that their action was private when the issue is sovereign immunity. *Ibrahim*, 391 F. Supp. 2d at 14 (citing *Sanchez-Espinoza*, 770 F.2d at 207).

In light of the Supreme Court's recognition of Congress' superior legitimacy in creating causes of action, *see Sosa*, 542 U.S. at 725-28, we note that it is not as though Congress has been silent on the question of torture or war crimes. Congress has frequently legislated on this subject in such statutes as the TVPA, the Military Commissions Act, 10 U.S.C. § 948a *et seq.*, the federal torture statute, 18 U.S.C. 2340-2340A, the War Crimes Act, 18 U.S.C. § 2441, and the Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq.*, but Congress has never created this cause of action. Perhaps most relevant is the TVPA, in which Congress provided a cause of action whereby U.S. residents could sue foreign states for torture, but did not – and we must assume that was a deliberate decision – include as possible defendants either American government officers or private U.S. persons,

whether or not acting in concert with government employees. We note that in his signing statement for the TVPA, President George H.W. Bush stated: "I am signing the bill based on my understanding that the Act does not permit suits for alleged human rights violations in the context of United States military operations abroad. . . ." Statement by President of the United States, *Statement by President George [H.W.] Bush upon Signing H.R.2092,* 1992 U.S.C.C.A.N. 91 (Mar. 12, 1992).

The judicial restraint required by *Sosa* is particularly appropriate where, as here, a court's reliance on supposed international law would impinge on the foreign policy prerogatives of our legislative and executive branches. *See, e.g., Garamendi,* 539 U.S. at 413-15; *Zschernig,* 389 U.S. at 440-41. As the *Sosa* Court explained: "Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution." *Sosa,* 542 U.S. at 727-28.[14]

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[14] We note that the Justice Department, in its brief before the Ninth Circuit in the *Sosa* matter, took the position that "the [ATS] is not intended as a vehicle for U.S. courts to judge the lawfulness of U.S. government actions abroad in defense of national security[,] and any remedies for such actions are appropriately matters for resolution by the political branches, not the courts." Brief for the United States as Amicus Curiae in Support of Reversal of the Judgment against Defendant-Appellant Jose

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Finally, appellants' ATS claim runs athwart of our preemption analysis which is, after all, drawn from congressional stated policy, the FTCA. If we are correct in concluding that state tort law is preempted on the battlefield because it runs counter to federal interests, the application of international law to support a tort action on the battlefield must be equally barred. To be sure, ATS would be drawing on federal common law that, in turn, depends on international law, so the normal state preemption terms do not apply. But federal executive action is sometimes treated as "preempted" by legislation. *See, e.g., Chamber of Commerce of U.S. v. Reich,* 74 F.3d 1322, 1332-39 (D.C. Cir. 1996). Similarly, an elaboration of international law in a tort suit applied to a battlefield is preempted by the same considerations that led us to reject the D.C. tort suit.

IV

For the aforementioned reasons, the judgment of the district court as to Titan is affirmed. The judgment as to CACI is reversed in the accompanying order. Thus, plaintiffs' remaining claims are dismissed.

So ordered.

Francisco Sosa, *Alvarez-Machain v. Sosa,* No. 99-56880 (9th Cir. Mar. 20, 2000).

GARLAND, *Circuit Judge*, dissenting: The plaintiffs in these cases allege that they were beaten, electrocuted, raped, subjected to attacks by dogs, and otherwise abused by private contractors working as interpreters and interrogators at Abu Ghraib prison. At the current stage of the litigation, we must accept these allegations as true. The plaintiffs do not contend that the United States military authorized or instructed the contractors to engage in such acts. No Executive Branch official has defended this conduct or suggested that it was employed to further any military purpose. To the contrary, both the current and previous Administrations have repeatedly and vociferously condemned the conduct at Abu Ghraib as contrary to the values and interests of the United States. So, too, has the Congress.

No act of Congress and no judicial precedent bars the plaintiffs from suing the private contractors – who were neither soldiers nor civilian government employees. Indeed, the only statute to which the defendants point expressly excludes private contractors from the immunity it preserves for the government. Neither President Obama nor President Bush nor any other Executive Branch official has suggested that subjecting the contractors to tort liability for the conduct at issue here would interfere with the nation's foreign policy or the Executive's ability to wage war. To the contrary, the Department of Defense has repeatedly stated that employees of private contractors accompanying the Armed Forces in the field are

not within the military's chain of command, and that such contractors *are* subject to civil liability.

Under the circumstances of these cases, there is no warrant for displacing the ordinary operation of state law and dismissing the plaintiffs' complaints solely on preemption grounds. Accordingly, I would affirm the district court's denial of summary judgment as to CACI and reverse its grant of summary judgment in favor of Titan.

I

Following the 2003 invasion of Iraq, the United States took over Abu Ghraib prison and used it as a detention facility. According to official Department of Defense (DOD) reports, "numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees" at Abu Ghraib between October and December 2003. MAJ. GEN. ANTONIO M. TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 16 (2004). Those reports noted the participation of contractor personnel in the abuses and specifically identified Titan and CACI employees as being among the perpetrators. *Id.* at 48; MAJ. GEN. GEORGE R. FAY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 72-73, 79, 81-82, 84, 86, 87, 89, 130-34 (2004) [hereinafter REPORT OF MAJ. GEN. FAY].

Responding to the release of graphic photographs of the conduct at Abu Ghraib, President George W.

Bush declared that "the practices that took place in that prison are abhorrent and they don't represent America." White House, Press Release, President Bush Meets with Al Arabiya Television, 2004 WLNR 2540883 (May 5, 2004). Concerned that those "who want to dislike America will use this as an excuse to remind people about their dislike," he assured "[t]he people of the Middle East . . . that we will investigate fully, that we will find out the truth . . . and [that] justice will be served." *Id.* Secretary of Defense Donald Rumsfeld, testifying before Congress, similarly condemned the abuses as "inconsistent with the values of our nation." Donald H. Rumsfeld, *Testimony Before the Senate and House Armed Services Committees* 1 (May 7, 2004).[1] He, too, stressed the damage "[t]o the reputation of our country," but said that "this is also an occasion to demonstrate to the world the difference between those who believe in democracy and human rights and those who believe in rule by the terrorist code. . . . Part of [our] mission – part of what we believe in – is making sure that when wrongdoing or scandal occur, that they are not covered up, but exposed, investigated, publicly disclosed – and the guilty brought to justice." *Id.* at 1, 6. Congress expressed the same sentiments.[2]

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[1] *Available at* http://armed-services.senate.gov/statemnt/2004/May/Rumsfeld.pdf.

[2] *See* S. Res. 356, 108th Cong. (2004) ("condemn[ing] in the strongest possible terms the despicable acts at Abu Ghraib prison"); H.R. Res. 627, 108th Cong. (2004) (declaring that the

(Continued on following page)

The seventeen named plaintiffs in the cases now before us contend that they (or their deceased husbands) were among the detainees who were subjected to the abuses that the President and Secretary of Defense decried. According to their complaints, they are Iraqi nationals (or their widows) who were detained at Abu Ghraib and eventually released without charge. The defendants are two private American companies, CACI and Titan. Pursuant to government contracts, CACI provided interrogators and Titan provided interpreters who worked at Abu Ghraib.

The plaintiffs contend that CACI and Titan employees subjected them to the following acts, among many others:

> "[T]ortur[ing] [Plaintiff Ibrahim's husband] by repeatedly inflict[ing] blows and other injuries to his head and body[,] . . . thereby causing extreme physical and mental pain and suffering and, ultimately, his death." Second Am. Compl. ¶ 33, *Ibrahim v. Titan Corp.* [hereinafter *Ibrahim* Compl.].
>
> "[T]ortur[ing] [Plaintiff] Aboud . . . [b]y beating him with fists and sticks; . . urinating on him; . . . [and] threatening to attack him with dogs." *Id.* ¶ 38.

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abuses at Abu Ghraib "are offensive to the principles and values of the American people and the United States military . . . and contradict the policies, orders, and laws of the United States and the United States military and undermine the ability of the United States military to achieve its mission in Iraq").

> "[T]ortur[ing] [Plaintiff] Hadod . . . [b]y beating him with fists and striking his head against a wall; [and] forcing him to watch his elderly father being hung up and then beaten." *Id.* ¶ 42.
>
> "[T]ortur[ing] [Plaintiff Al Jumali's husband] by beating him, gouging out one of his eyes, electrocuting him, breaking one of his legs, and spearing him, . . . thereby causing . . . his death." *Id.* ¶ 51.
>
> "Roping Plaintiff Saleh and 12 other naked prisoners together by their genitals and then pushing one of the male detainees to the ground, causing the others to suffer extreme physical, mental and emotional distress;. . . . [r]epeatedly shocking Plaintiff Saleh with an electric stick and beating him with a cable; . . . [and][t]ying his hands above his head and sodomizing him. . . ." Third Am. Compl. ¶ 116, *Saleh v. Titan Corp.* [hereinafter *Saleh* Compl.].
>
> "Stripping [Plaintiff Al-Nidawi], tying his hands behind his back and releasing dogs to attack his private parts." *Id.* ¶ 142.
>
> "[F]orc[ing] Plaintiff Haj Ali to stand on a box, with electrical wires attached to his wrists and [shocking] him with intense pulses of electricity. . . ." *Id.* ¶ 125.

Plaintiffs sued defendants for (inter alia) the common law torts of assault, battery, and intentional infliction of emotional distress. In their complaints, they name specific CACI and Titan employees alleged to have

brutalized them. *Ibrahim* Compl. ¶¶ 37, 55; *Saleh* Compl. ¶¶ 17-19, 24-27, 49-50.

Although today's opinion states that the plaintiffs complain only of "abuse" and not "torture," Slip Op. at 4, the complaints repeatedly describe the conduct to which they were subjected as "torture." *See, e.g.*, *Ibrahim* Compl. ¶ 1 ("Specifically, the Plaintiffs allege that they or their decedents . . . were unlawfully tortured by agents or employees of the Defendants. . . ."); *Saleh* Compl. ¶ 1 ("alleg[ing] that Defendants tortured and otherwise mistreated Plaintiffs"). The district court certainly understood that to be what the plaintiffs allege. *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 12 (D.D.C. 2005) (Plaintiffs "assert that defendants and/or their agents tortured one or more of them."). And that is what the plaintiffs continue to allege in their briefs on appeal, which accuse both CACI and Titan employees of torturing them. *See, e.g.*, Plaintiffs-Appellees' Br. 17 (regarding CACI); Plaintiffs-Appellants' Reply Br. 11, 13, 16 (regarding Titan). In any event, the quotations set out in the previous paragraph describe some of the most egregious of the conduct at issue, and there is no dispute that if tort law applies, plaintiffs have stated a cause of action.

The court's opinion also appears to take issue with the merits of some of the plaintiffs' allegations, suggesting that government determinations cast doubt upon whether the plaintiffs were actually subjected to

this conduct by the defendants. That is not correct.[3] More important, it is irrelevant. To date, there has been *no* discovery or summary judgment on the merits of the plaintiffs' allegations – the district court limited these to the issue of preemption. *See* 391 F. Supp. 2d at 18-19. Accordingly, and as the court acknowledges, at this stage of the litigation we must take the allegations of the complaints to be true. Slip Op. at 4; *see Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993). In light of the DOD reports about what

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[3] For example, the court accepts Titan's view that government investigations found that its employees were not involved in detainee abuse at Abu Ghraib. Slip Op. at 4. But Titan is wrong. *See* REPORT OF MAJ. GEN. FAY at 133 (finding that a Titan employee "[a]ctively participated in detainee abuse"); *id.* at 130-34 (referring two Titan and three CACI employees for possible prosecution); *see also id.* at 84 (finding that "[t]he use of dogs in the manner directed by" a CACI employee "was clearly abusive and unauthorized"). Moreover, there is no indication that the government investigators had before them the same evidence that these plaintiffs intend to present. The court also notes that the U.S. Army Claims Service has rejected one plaintiff's claim for compensation (that of Saleh himself), Slip Op. at 3-4, but there is no hint that the Claims Service has ever considered the merits of the sixteen other plaintiffs' cases. Finally, the court notes that, to date, the government has not criminally charged the contract employees. Slip Op. at 3, 18. But this sheds little light on the merits of the plaintiffs' claims, given the different burdens of proof applicable to civil and criminal proceedings, as well as the special jurisdictional problems potentially attendant to the latter. *See* REPORT OF MAJ. GEN. FAY at 49-50 (noting that, because CACI's contract may have been with the Interior Department rather than DOD, its employees "*may* not be subject to the Military Extraterritorial Jurisdiction Act").

happened at Abu Ghraib, we can hardly regard those allegations as implausible.

Moreover – and more important still – today's decision preempts all such litigation, regardless of its merit. Indeed, the decision would preempt any lawsuit, even if the plaintiff had photographs that unambiguously showed private contractors in the act of abusing them. Given the findings of DOD and the declarations of President Bush and Secretary Rumsfeld, there may be at least some prisoners who have equivalent evidence. Nonetheless, far from simply "tak[ing] the plaintiffs' cases as they present them to us," Slip Op. at 4, my colleagues effectively dispose of any cases that any plaintiffs could possibly present.

Finally, it should also be emphasized that neither the *Ibrahim* nor the *Saleh* complaints allege that the defendants' actions were ordered or authorized by the United States government. Nor has any party proffered any evidence that the United States did order or authorize such conduct, or that it was undertaken to obtain information or to further any other military purpose.[4] To the contrary, the plaintiffs contend that the contractors "acted unlawfully and *without mili-*

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[4] *See* Plaintiffs-Appellees' Br. 45-46 ("The limited discovery permitted by the District Court to date, combined with the military investigations and testimony regarding Abu Ghraib, strongly suggests that the CACI employees actually were the ringleaders in the illegal abuse. . . . CACI failed to present any evidence whatsoever that the CACI employees were directed by the military, [or] received military authorization and approval, to abuse prisoners.").

tary authorization." Plaintiffs-Appellees' Br. 46 (emphasis added).[5] The *Saleh* (but not the *Ibrahim*) complaint does charge that the private contractors acted together with a small number of low-ranking soldiers – soldiers who were later court-martialed for their unauthorized, illegal conduct. *Saleh* Compl. ¶ 28; Plaintiffs-Appellees' Br. 17-18, 24.[6] But there is no allegation, and no evidence, that those soldiers had any control, de jure or de facto, over the defendants. Hence, it is incorrect to say that "these cases are really indirect challenges to the actions of the U.S. military." Slip Op. at 12. Rather, they are direct challenges to the unlawful and unauthorized actions of private contractors.

II

The court directs the dismissal of the plaintiffs' common law tort claims on the ground that they are

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[5] *See Ibrahim* Compl. ¶ 29 (alleging that the defendants committed the acts "[d]espite . . . clear expressions of United States policy, and despite the expectation that the Defendants would perform their contractual duties in accordance with United States and international law"); *Saleh* Compl. ¶ 108 (alleging that the United States intended the contractors to "conduct interrogations in accord with the relevant domestic and international laws").

[6] A separate RICO statement, filed solely by the *Saleh* plaintiffs, also alleged a broader conspiracy, but the district court dismissed the RICO count and the *Saleh* plaintiffs have abandoned the allegation. *See* Plaintiffs-Appellees' Br. 46. The *Ibrahim* plaintiffs never made such an allegation. *See id.* at 2.

preempted by federal law. But what federal law does the preempting?

The defendants (and the court) cite only one law: the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-80. But if we follow our usual rule – to learn the meaning of a statute by reading its text – preemption under that Act is inappropriate. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). The text of the FTCA does indeed evidence congressional concern with common law tort claims, but that concern is directed solely at claims leveled "against the United States" for the wrongful acts of "any employee of the Government." *Id.* § 1346(b)(1). The Act *permits* plaintiffs to sue the United States in federal court for state-law torts committed by government employees within the scope of their employment, but contains specific exceptions that preserve the government's sovereign immunity under certain circumstances. *Id.* §§ 1346(b), 2671-80. Nothing in the language of the statute applies to suits brought against independent contractors, like the defendants in these cases. In fact, the reverse is true. Although the FTCA states that the term "[e]mployee of the government" includes "employees of any federal agency," it expressly states that "the term 'Federal agency' . . . *does not include any contractor* with the United States." *Id.* § 2671 (emphasis added).

In *Boyle v. United Technologies Corp.*, the Supreme Court invoked an implied, but direct conflict with the FTCA to conclude that the manufacturer of a Marine helicopter could not be held liable under state tort law for injury caused by a design defect. 487 U.S. 500 (1988). The defendants and my colleagues believe that "plaintiffs' common law tort claims are controlled by *Boyle*." Slip Op. at 9. I agree. In this Part, I will explain why a straightforward application of *Boyle* yields the conclusion that preemption of the plaintiffs' claims is unwarranted, and why we should hesitate to extend *Boyle* beyond the scope of the discretionary function exception and direct-conflict rationale that the Court relied upon in that case. My "quarrel" is not with *Boyle* – as my colleagues suppose, *id.* at 10 – but rather with the way in which they have extended *Boyle* beyond its rationale.

A

Nothing in *Boyle* itself warrants the preemption of state tort law in these cases. *Boyle* involved the co-pilot of a U.S. Marine helicopter who was killed when the helicopter crashed into the ocean. His father brought a diversity action against the contractor that built the helicopter for the United States, alleging that the design was defective because the escape hatch opened outward instead of inward – rendering it inoperable in a submerged craft. The first question the Supreme Court asked was whether the case involved "uniquely federal interests." *Boyle*, 487 U.S. at 504-05. With little difficulty, the Court concluded

that "the liability of independent contractors performing work for the Federal Government . . . is an area of uniquely federal interest." *Id.* at 505 n.1. There is likewise no dispute regarding that question here.

But *Boyle* also declared that the fact that "the procurement of equipment by the United States is an area of uniquely federal interest does not . . . end the inquiry." *Id.* at 507. "That merely establishes a necessary, not a sufficient, condition for the displacement of state law." *Id.* "Displacement," the Court declared, "will occur only where . . . a significant conflict exists between an identifiable federal policy or interest and the [operation] of state law, or the application of state law would frustrate specific objectives of federal legislation." *Id.* (internal citations and quotation marks omitted). "The conflict with federal policy need not be as sharp as that which must exist for ordinary preemption when Congress legislates in a field which the States have traditionally occupied. . . . *But conflict there must be.*" *Id.* at 507-08 (emphasis added) (internal quotation marks omitted).

The Court began with a hypothetical illustrating an instance when preemption would not be warranted. "[I]t is easy to conceive," the Court said, of a "situation[ ] in which the duty sought to be imposed on the contractor" by state law "is not identical to one assumed under the contract, but is also not contrary to any assumed":

> If, for example, the United States contracts for the purchase . . . of an air conditioning-unit, specifying the cooling capacity but not the precise manner of construction, a state law imposing upon the manufacturer of such units a duty of care to include a certain safety feature would not be a duty identical to anything promised the Government, but neither would it be contrary. The contractor could comply with both its contractual obligations and the state-prescribed duty of care.

Id. at 509. "No one suggests that state law would generally be pre-empted in this context," the Court said. *Id.* By contrast to the hypothetical air conditioner, however, the Court found a significant conflict of duties in the case of the helicopter:

> Here the state-imposed duty of care that is the asserted basis of the contractor's liability (specifically, the duty to equip helicopters with the sort of escape-hatch mechanism petitioner claims was necessary) *is precisely contrary to the duty imposed by the Government contract* (the duty to manufacture and deliver helicopters with the sort of escape-hatch mechanism shown by the specifications).

Id. (emphasis added).

The Court then invoked the FTCA's "discretionary function" exception to delimit the circumstances in which a state-imposed duty that is "precisely contrary to" a government contract should be preempted.

The Court noted that one of the circumstances that the FTCA excepted from the statute's consent to suit was for:

> [a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform *a discretionary function* or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Id. at 511 (emphasis added) (quoting 28 U.S.C. § 2680(a)). "[T]he selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision," the Court said, and "state law which holds Government contractors liable for design defects in military equipment does *in some circumstances* present a 'significant conflict' with federal policy and must be displaced." *Id.* at 511-12 (emphasis added). The Court then outlined "the scope of displacement" necessary to avoid such conflict as follows:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment. . . . The first two of these conditions assure . . . that the design feature in question was considered by a Government

> officer, and not merely by the contractor itself.

Id. at 512.

The contracts at issue in the instant cases are like the one for the hypothetical air conditioner, not the helicopter. As in the contract for the air conditioner, these contracts simply required the contractors to provide particular receivables: interrogators and interpreters. The "asserted basis of the contractor's liability" – the abuse of prisoners – is plainly not "precisely contrary to the duty imposed by the Government contract." No party's pleadings contend that the government required or authorized the contractor personnel at Abu Ghraib to do what state law forbids. To the contrary, the plaintiffs' contention is that the contractors "acted unlawfully and *without military authorization.*" Plaintiffs-Appellees' Br. 46 (emphasis added); *see supra* note 5.

Boyle has never been applied to protect a contractor from liability resulting from the contractor's violation of federal law and policy. And there is no dispute that the conduct alleged, if true, violated both.[7] Hence, these cases are not "within the area

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[7] My colleagues appear to acknowledge that, if the contractors' employees committed the acts alleged here, their conduct would violate U.S. law. *See* Slip Op. at 3 (citing 18 U.S.C. § 2340A (torture); *id.* § 2441 (war crimes); *id.* § 3261 (certain criminal offenses committed by anyone "employed by or accompanying the Armed Forces outside the United States")); *see also, e.g.,* 18 U.S.C. § 113 (describing assaults within the compass of

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where the policy of the 'discretionary function' would be frustrated," and they present no "significant conflict" with federal interests. *Boyle*, 487 U.S. at 512. Preemption is therefore not justified under *Boyle*.

B

Recognizing that they cannot prevail under either the text of the FTCA or the holding of *Boyle*, the defendants ask us to expand the scope of judge-made preemption. Instead of basing preemption on the FTCA's discretionary function exception – the only exception *Boyle* discussed – the defendants ask us to extend *Boyle* to the exception for "claim[s] arising out of the combatant activities of the military or naval forces . . . during time of war." 28 U.S.C. § 2680(j). That request finds no support in either *Boyle* or other precedents.

At the heart of *Boyle*'s analysis is the doctrine of conflict preemption. *See supra* Part II.A. As my colleagues note, preemption under the discretionary function exception is in accord with that doctrine, as it requires "a sharp example of discrete conflict in which satisfying both state and federal duties (*i.e.*, by designing a helicopter hatch that opens both inward

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§ 3261). The Army Field Manual requires contractors to "comply with all applicable U.S. and/or international laws." U.S. DEP'T OF THE ARMY, FIELD MANUAL 3-100.21, CONTRACTORS ON THE BATTLEFIELD § 1-39 (2003); *see also* REPORT OF MAJ. GEN. FAY at 12-13 (stating that "civilians who accompany or work with the U.S. Armed Forces" are "bound by Geneva Conventions").

and outward) was impossible." Slip Op. at 13. By contrast, preemption under the combatant activities exception is extraordinarily broad; as employed by my colleagues, it results not in conflict preemption but in "field preemption." *Id.* at 10, 13. Given that using the FTCA to preempt suits against private contractors is atextual, the *Boyle* Court's decision to require discrete conflict was quite sensible.

Moreover, if we go down this road and extend *Boyle* to the combatant activities exception, there is no reason to stop there. The FTCA's exceptions are not limited to discretionary functions and combatant activities. As my colleagues note, they also include "any claim arising in a foreign country." Slip Op. at 10 n.3 (quoting 28 U.S.C. § 2680(k)). Hence, the "degree of integration" test that my colleagues carefully construct for combatant activities preemption, Slip Op. at 7, seems wholly beside the point: the plaintiffs' claims arose in Iraq, a foreign country, so why should that not be the end of the matter? Indeed, the FTCA has an additional exception that protects the government from suit for "assault [and] battery" – whether it occurs abroad or in the United States. 28 U.S.C. § 2680(h). On the court's theory, why should these exceptions not apply to private contractors as well? Once we depart from the limiting principle of *Boyle*, it is hard to tell where to draw the line.

The Supreme Court has never extended *Boyle* beyond the discrete conflicts that application of the discretionary function exception targets. Quite the opposite, in *Correctional Services Corp. v. Malesko*,

the Court described the *Boyle* defense as a "special circumstance" in which the "government has directed a contractor to do the very thing that is the subject of the claim." 534 U.S. 61, 74 n.6 (2001). *Wyeth v. Levine*, the Supreme Court's most recent preemption case, further reflects the Court's unwillingness to read broad preemptive intent from congressional silence. As *Wyeth* explained, the Court starts with the presumption that state law is not to be superseded "unless that was the clear and manifest purpose of Congress." 129 S. Ct. 1187, 1194-95 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). The Court "rel[ies] on the presumption because respect for the States as 'independent sovereigns in our federal system' leads us to assume that 'Congress does not cavalierly pre-empt state-law causes of action.'" *Id.* at 1195 n.3 (quoting *Medtronic*, 518 U.S. at 485). Thus, *Wyeth* counsels against extending *Boyle* beyond its holding, as the FTCA evidences no "clear and manifest purpose of Congress" to preempt state-law actions against contractors under the combatant activities exception. *Id.* at 1195. Although my colleagues perceive support for their own position in *Wyeth* – a decision in which the Court found that a federal statute *did not* preempt state tort claims – I do not see it. It may be that congressional intent "is much clearer in the case of the statutory text of the combatant activities exception" than in "federal drug regulations." Slip Op. at 19. But the only intent that is clear in the former text is the intent to preserve sovereign immunity in suits against the United States. The FTCA says nothing at all about suits

against "contractors" other than that contractors are *not* "federal agenc[ies]" for purposes of the Act. 28 U.S.C. § 2671.

No other circuit court has gone as far as our circuit goes today. *Koohi v. United States* was, like *Boyle,* a products liability case. 976 F.2d 1328 (9th Cir. 1992). There, the Ninth Circuit did apply the combatant activities exception to bar suit against the manufacturer of an air defense system deployed on a U.S. naval vessel that shot down an Iranian aircraft. As my colleagues recognize, however, the Ninth Circuit's rationale was that tort liability is inappropriate where "*force is directed as a result of authorized military action.*" Slip Op. at 12 (emphasis added) (quoting *Koohi,* 976 F.2d at 1337). Unlike the situation in *Koohi,* where sailors fired the weapon, there is no claim here that the force used against the plaintiffs was either "directed" or "authorized" by U.S. military personnel.

Nor are my colleagues assisted by the foreign policy cases they cite. Slip Op. at 20-21. Those cases involved preemption of state laws that were *specifically targeted* at issues concerning the foreign relations of the United States, a description the court does not dispute.[8] Moreover, in virtually all of them,

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[8] Rather than dispute this, the court notes that it is "a black-letter principle of preemption law that generally applicable state laws *may* conflict with and frustrate the purposes of a federal scheme just as much as a targeted state law." Slip Op. at 21 n.8 (emphasis added). As long as the word "may" is emphasized,

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the preempted state laws conflicted with *express* congressional or executive policy regarding the targeted issues. Although the court does dispute this description as to two of the cited cases, the description is accurate. In *American Insurance Association v. Garamendi*, the Supreme Court found a "clear conflict" between a California statute applying only to Holocaust-era insurance "policies issued by European companies, in Europe, to European residents," and "express federal policy" contained in Executive Branch agreements with Germany, Austria, and France. 539 U.S. 396, 425-26 (2003). Similarly, in *Crosby v. National Foreign Trade Council*, the Court preempted a state statute that expressly purported to regulate foreign commerce with Burma in ways that "undermine[d] the intended purpose and 'natural effect'" of

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that principle is correct. But this does not call into question the fact that no precedent has employed a foreign policy analysis to preempt generally applicable state laws (not to mention the fact that there is also no "federal scheme" here). *See* Jack Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1711 (1997) (explaining that foreign affairs preemption should be limited to, at most, state laws that purposely interfere with foreign policy, not state laws that "are facially neutral and were not designed with the purpose of influencing U.S. foreign relations"). The three additional Supreme Court cases that the court cites, Slip Op. at 21 n.8, are simply inapposite. None involved foreign policy and all three involved statutory provisions that expressly preempted state law. *See Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1007-8 (2008); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 442-43 (2005); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 520-23 (1992) (plurality opinion).

a congressional sanctions regime aimed directly at Burma. 530 U.S. 363, 373 (2000).[9]

The cases before us, by contrast, involve the application of facially neutral state tort law. And there is no express congressional or executive policy with which such law conflicts. *See infra* Part II.C.[10] No

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[9] *See also Zschernig v. Miller*, 389 U.S. 429, 432, 440 (1968) (holding that an Oregon probate statute, which barred residents' inheritances from going to heirs in countries with confiscatory property laws, was being used to "withhold[ ] remittances to legatees residing in Communist countries" and thereby "intru[de] . . . into the field of foreign affairs"); *Hines v. Davidowitz*, 312 U.S. 52, 67, 74 (1941) (concluding that Pennsylvania's Alien Registration Act "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting "a single integrated and all-embracing system" in the federal Alien Registration Act). *See generally Medellin v. Texas*, 128 S. Ct. 1346, 1371-72 (2008) (describing *Garamendi* as a mere foreign "claims-settlement case[ ] involv[ing] a narrow set of circumstances"); *Garamendi*, 539 U.S. at 417 (describing *Zschernig* as involving a state law that "in practice had invited minute inquiries concerning the actual administration of foreign law and so was providing occasions for state judges to disparage certain foreign regimes" (internal citation and quotation marks omitted)). The remaining case cited by the court, *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), involved application of the Constitution's Foreign Commerce Clause to state taxation of foreign commerce.

[10] In a footnote to this part of their argument, my colleagues list a miscellany of federal civil and criminal statutes relating to torture. Although they describe the list as "comprehensive," Slip Op. at 23 n.9, that description is not Congress' characterization, but theirs. Nor is there any evidence that Congress affirmatively "*declined to* create a civil tort cause of action that plaintiffs could employ," *id.* (emphasis added) – let alone that Congress intended these statutes to displace existing state or federal law. Indeed,

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precedent has employed a foreign policy analysis to preempt state law under such circumstances.[11]

My colleagues acknowledge that the "nature of the conflict" they perceive in these cases is "somewhat different from that in *Boyle* — a sharp example of discrete conflict in which satisfying both state and federal duties . . . was impossible." Slip Op. at 13. "Rather," they say, here "it is the imposition per se" of state tort law "that conflicts with the FTCA's *policy* of eliminating tort concepts from the battlefield." *Id.* (emphasis added). In short, the court's decision to utilize the combatant activities exception requires it to shift from preemption based on conflict-of-duty to

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the only evidence of the purpose of the principal civil statute the court cites, the Torture Victim Protection Act, 28 U.S.C. § 1350 note, is that it was intended to "enhance the remedy already available" for torture victims under the ATS, S. REP. NO. 102-249, at 5 (1991); *see* H.R. REP. NO. 102-367, at 4 (1991) (same). As for the federal criminal statutes, Congress has passed a myriad of such statutes covering virtually every area of modern life, and no court has ever suggested that in so doing the legislature intended to preempt existing state laws. If anything, the cited statutes — all of which condemn torture — confirm that there is no conflict between state law and federal policy on that issue.

[11] *Cf. Medellin*, 128 S. Ct. at 1371-72 (refusing to preempt a "neutrally applicable state law[ ]" despite the President's affirmative submission that United States foreign policy would be undermined); *Garamendi*, 539 U.S. at 425-26 (preempting a California insurance statute, but distinguishing it from "a generally applicable 'blue sky' law" because the California statute "effectively singles out only policies issued by European companies, in Europe, to European residents").

preemption based on conflict-of-policy. But even if this shift were justified, we would still have no basis for ruling that such a conflict of policy exists.

1. According to the court, "the policy embodied by the combatant activities exception is simply the elimination of tort from the battlefield," and that policy is "equally implicated whether the alleged tortfeasor is a soldier or a contractor" under the circumstances at issue in these cases. Slip Op. at 12. The court is plainly correct that the FTCA's policy is to eliminate *the U.S. government's* liability for battlefield torts. That, after all, is what the FTCA says. But it is not plain that the FTCA's policy is to eliminate liability when the alleged tortfeasor is a contractor rather than a soldier. That, after all, is *not* what the FTCA says. *See W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991) (declaring that "[t]he best evidence of [congressional] purpose is the statutory text"). Nor, as the court recognizes, is there any support for its position in the "singularly barren" legislative history of the combatant activities exception. Slip Op. at 11 (quoting *Johnson v. United States*, 170 F.2d 767, 769 (9th Cir. 1948)).

Congress knows full well how to make its intention to preclude private liability known. *See, e.g.*, 22 U.S.C. § 2291-4(b) (providing that interdiction of an aircraft over foreign territory pursuant to a presidentially approved program "shall not give rise to any civil action . . . against the United States or its employees *or agents*" (emphasis added)). It has not done so here. Rather, as already discussed, Congress

expressly excluded contractors from the definition of federal agencies that retained sovereign immunity under the exceptions to the Act. *See* 28 U.S.C. § 2671.

Indeed, because the FTCA concerns only the immunity of the United States, the FTCA itself does not even protect soldiers or other government employees from tort suits. That protection is afforded by the Westfall Act, which provides that, "[u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment," the federal employee is dismissed and "the United States shall be substituted as the party defendant." 28 U.S.C. § 2679(d)(1). "Thereafter, the suit is governed by the FTCA and is subject to all of the FTCA's exceptions" to the waiver of sovereign immunity, including the combatant activities exception. *Wuterich v. Murtha*, 562 F.3d 375, 380 (D.C. Cir. 2009); *see* 28 U.S.C. § 2679(d)(4).

But contractors are not covered by the Westfall Act either. In fact, because that Act uses the FTCA's definitions, they are again expressly excluded from its protections. 28 U.S.C. § 2671. And yet, the court preempts this state tort action without requiring (or receiving) the Attorney General certification that would have been necessary had the defendants been government employees rather than private contractors. It thus grants private contractors *more* protection than our soldiers and other government employees receive. Such a congressional policy cannot be inferred from the language of the FTCA.

2. There is also no indication that the Executive Branch shares the court's judgment that military contractors must be exempt from tort law. To the contrary, DOD has advised contractors that accompany the Armed Forces in the field that they *are* subject to civil liability, and it has rejected a request to extend *Boyle* to all combatant activities. Moreover, it has lent no support whatsoever to the defense of the contractors here.

In a rulemaking "to implement DOD policy regarding contractor personnel authorized to accompany U.S. Armed Forces deployed outside the United States," the Department explicitly advised military contractors that "[i]nappropriate use of force could subject a contractor or its subcontractors or employees to prosecution or *civil liability* under the laws of the United States and the host nation." Contractor Personnel Authorized to Accompany U.S. Armed Forces, 73 Fed. Reg. 16,764, 16,764, 16,767 (Mar. 31, 2008) (emphasis added) [hereinafter DFARS Rule]; *see* 48 C.F.R. § 252.225-7040(b)(3)(iii) (same).[12] When contractors expressed concern about the consequences of this advisory for their defenses in tort litigation, DOD made clear that it thought "the rule adequately allocates risks." DFARS Rule, 73 Fed. Reg. at 16,768. And it specifically rejected a suggestion that it "invite

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[12] As there is no existing federal common law of torts that could impose civil liability, DOD's warning of civil liability under the laws of the United States can only be a reference to state tort law.

courts" to expand the reach of *Boyle* by adopting "language that would immunize contractors from tort liability." *Id.* The Department stated:

> [T]he clause retains the current rule of law, holding contractors accountable for the negligent or willful actions of their employees, officers, and subcontractors. . . . The public policy rationale behind *Boyle* does not apply when a performance-based statement of work is used in a services contract, because the Government does not, in fact, exercise specific control over the actions and decisions of the contractor or its employees or subcontractors. . . . Contractors will still be able to defend themselves when injuries to third parties are caused by the actions or decisions of the Government. However, to the extent that contractors are currently seeking to avoid accountability to third parties for their own actions by raising defenses based on the sovereignty of the United States, this rule should not send a signal that would invite courts to shift the risk of loss to innocent third parties.

Id.[13]

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[13] The court states that "there is no indication" in the above-quoted statement that DOD "considered, much less ruled out, whether tort suits against service contractors *working within the military chain of command* should be preempted." Slip Op. at 17 (emphasis added). But as discussed below, DOD's position is that contractors are *not* within the military chain of command. *See infra* Part III.A.

Nor has the Executive Branch evinced any concern about the imposition of tort liability in the cases now before us, notwithstanding the Army's knowledge of the ongoing litigation.[14] My colleagues are nonetheless convinced that the failure to institute criminal proceedings against the contractors "indicates the government's perception of the contract employees' role in the Abu Ghraib scandal." Slip Op. at 18.[15] No such inference from prosecutorial silence is warranted. The government may well believe that it faces a jurisdictional barrier to prosecution, *see supra* note 3; it may lack the evidence that these plaintiffs have; it may feel that its evidence is insufficient to satisfy the higher burden of proof applicable to a criminal prosecution; or it may simply prefer to rely on the tort system. What we cannot conclude, however, is that the government doubts "the contract employees' role in the Abu Ghraib scandal." Slip Op. at 18. *See* REPORT OF MAJ. GEN. FAY at 130-34 (implicating two

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[14] *Compare Garamendi*, 539 U.S. at 411, 413 (citing a letter from Deputy Secretary Eizenstat to California officials stating that the California statute threatened to derail U.S. negotiations with Germany, and the amicus brief of the United States in support of preemption); *Crosby*, 530 U.S. at 386 (reasoning that "repeated representations by the Executive Branch . . . demonstrate that the state Act stands in the way of Congress's diplomatic objectives"); *Boyle*, 487 U.S. at 501-02 (in which the United States appeared as amicus curiae in support of preemption); *Hines*, 312 U.S. at 56 (same).

[15] The court also states that no "disciplinary" or "contract proceedings" have been instituted. Slip Op. at 18. There is, however, nothing in the record indicating whether such proceedings have been brought.

Titan and three CACI employees in wrongdoing at Abu Ghraib); *id.* at 84 (finding that "[t]he use of dogs in the manner directed by" a CACI employee "was clearly abusive and unauthorized"); *id.* at 133 (finding that a Titan employee "[a]ctively participated in detainee abuse").

The position DOD took in its rulemaking on contractor liability may reflect the government's general view that permitting contractor liability will advance, not impede, U.S. foreign policy by demonstrating that "the United States is committed to ensuring that its contractors are subject to proper oversight and held accountable for their actions." U.S. Dep't of State, Press Release, Department of State Legal Adviser Promotes Accountability for Private Military and Security Companies (Sept. 17, 2008).[16] The government may have refrained from participating in the two cases now before us for the same reason. As President Bush stated, "the practices that took place in that prison are abhorrent and they don't represent America." White House, Press Release, President Bush Meets with Al Arabiya Television, 2004 WLNR 2540883 (May 5, 2004). Under these circumstances, the government's failure to defend the contractors may reflect the Executive Branch's view that the country's interests are better served by demonstrating that "people will be held to account

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[16] *Available at* http://geneva.usmission.gov/Press2008/September/0917PrivateSecurity.html.

according to our laws." White House, Press Release, Press Conference of the President, 2006 WLNR 10248633 (June 14, 2006). And the Executive may believe that one way to show that "people will be held to account" is to permit this country's legal system to take its ordinary course and provide a remedy for those who were wrongfully injured.

None of this is to suggest that we can know with certainty the unexpressed policy views of Congress or the Executive, or to discount the reasonableness of the policy concerns expressed by my colleagues. Quite the contrary. But the existence of plausible yet divergent assessments of the policy consequences of tort liability further counsels against judicial preemption. If Congress believes that such liability would hamper the war effort, it can amend the FTCA or the Westfall Act to protect private contractors. If the Executive is of that view, it can say so.

Under the rule adopted today, however, the court has removed an important tool from the Executive's foreign policy toolbox. Even if the Executive believes that U.S. interests would be advanced by subjecting private contractors to tort liability under these circumstances, today's decision makes it impossible to accomplish that end absent congressional action. That is a particularly ironic consequence of a rule that the court adopts based upon a quite proper concern that the Judiciary not interfere with the Executive's flexibility in the area of foreign policy.

3. In addition to their argument that the imposition of tort liability on contractors constitutes a per se conflict with the policy of the political branches, my colleagues raise more specific policy conflicts they believe tort suits would engender. Slip Op. at 13-14.

The court notes, for example, that "the costs of imposing tort liability on government contractors [will be] passed through to the American taxpayer, as was recognized in *Boyle*." *Id.* at 13. The *Boyle* Court did indeed recognize the risk of a monetary pass-through, but it did not respond by preempting all tort liability for government contractors. In fact, the Court thought that was "too broad" a response to the potential pass-through problem, *Boyle,* 487 U.S. at 510, and instead barred recovery only where there was a direct conflict with a government-imposed duty, *see id.* at 512.

My colleagues also express concern that, in the absence of preemption, U.S. military personnel will be haled into court or deposition proceedings involving private contractors. Slip Op. at 13. But that concern does not require across-the-board preemption. Where discovery would hamper the military's mission, district courts can and must delay it – until personnel return stateside, or until the end of the war if necessary.[17] Where production of witnesses or

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[17] *See Watts v. SEC,* 482 F.3d 501, 509 (D.C. Cir. 2007) (noting that district courts have the tools, "in cases involving third-party subpoenas to government agencies or employees," to "properly accommodate the government's serious and legitimate

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documents would damage national security regardless of timing, the usual privileges apply.[18] To deny preemption is not to grant plaintiffs free reign.[19]

4. The court further suggests that the broad field preemption it prescribes is required to properly balance the federal and state interests at stake in this kind of litigation. In support of this contention, the court declares that the "federal government's interest in preventing military policy from being

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concern that its employee resources not be commandeered into service by private litigants to the detriment of the smooth functioning of government operations" (internal quotation marks omitted)).

[18] *See Watts*, 482 F.3d at 508 (noting that Federal Rule of Civil Procedure 45 "requires that district courts quash subpoenas that call for privileged matter or would cause an undue burden"); *Ibrahim*, 391 F. Supp. 2d at 16 (declining "to dismiss otherwise valid claims at this early stage," but suggesting that the court would dismiss if "[m]anageability problems" emerge, "especially if discovery collides with government claims to state secrecy").

[19] The court further suggests that "allowance of these claims will potentially interfere with the federal government's authority to punish and deter misconduct by its own contractors." Slip Op. at 14. The court does not say why punishment and civil liability cannot coexist, or indeed, why they do not complement each other. The prospect of material interference is hardly self-evident, as parallel government and private litigation is the norm in cases ranging from assault, to antitrust, to securities regulation. *See, e.g.*, *Wyeth*, 129 S. Ct. at 1202 (noting that state law tort suits can complement federal enforcement by the FDA). In any event, the executive branch – which presumably knows more about what would interfere with its prerogatives than we do – has taken the position that civil liability should be available against military contractors. *See supra* Part II.C.2.

subjected to fifty-one separate sovereigns . . . is not only broad – it is also obvious." Slip Op. at 19. The point is indeed obvious, but also inapposite. As discussed above, there is nothing in the pleadings or record to suggest that the abuse alleged here was part of any "military policy." Moreover, even if there were a jurisdiction whose tort law conflicted with military policy, *Boyle* itself would provide a narrower answer: selective preemption of "only particular elements" of the state's law. *Boyle*, 487 U.S. at 508 (citing *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 595 (1973), for the proposition that, "assuming state law should generally govern federal land acquisitions, [the] particular state law at issue may not").[20]

The court also expresses puzzlement over what interest any state could "have in extending its tort law onto a foreign battlefield." Slip Op. at 17. But there is no issue of "extending" a state's law here; the

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[20] My colleagues repeatedly raise the specter that the district court might apply Iraqi tort law. *See* Slip Op. at 11, 12, 19. But the plaintiffs reject Iraqi law as a basis for their claims, and the district court did not contemplate it. Plaintiffs-Appellees' Br. 53-54. Nor is it a realistic possibility. As we explained in *Sami v. United States*, "prevailing conflicts [of law] principles . . . permit application of an alternate substantive law when foreign law conflicts with a strong public policy of the forum." 617 F.2d 755, 763 (D.C. Cir. 1979) (footnote omitted). But even if that specter were more corporeal, it would at most warrant application of the selective preemption option mentioned above and discussed in *Boyle*, 487 U.S. at 508, not the kind of field preemption adopted in today's ruling.

case involves only the application of a state's traditional, generally applicable tort law. That such law may apply to conduct in a foreign country is hardly unusual. Under the Foreign Sovereign Immunities Act, for example, state tort law typically provides a cause of action even for plaintiffs who sue foreign sovereigns, including for conduct that takes place abroad.[21]

This is not to deny that many states would indeed have little or no interest in this particular litigation. But it is not clear that Virginia and California,[22] the states in which CACI and Titan maintain their principal places of business, have no interest in ensuring that their corporations refrain from abusing prisoners – even in a foreign country. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9 cmt. f (1971) ("[A] person is most closely related to the state of his domicil[e], and this state has jurisdiction to apply its local law to determine certain of his interests even

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[21] *See, e.g., Republic of Austria v. Altmann*, 541 U.S. 677, 685 & n.4 (2004); *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11; *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 491 (1983); *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1125, 1129 (D.C. Cir. 2004).

[22] The *Saleh* plaintiffs originally filed their complaint in federal district court in Titan's home jurisdiction of California, from which the case was transferred at CACI's request. *Saleh v. Titan Corp.*, 361 F. Supp. 2d 1152, 1155 (S.D. Cal. 2005). Our district court has not yet addressed the question of which state law should apply, having limited initial proceedings to the question of preemption.

when he is outside its territory. It may, for example, . . . forbid him to do certain things abroad.").

More important, even if the court were correct that "the interests of any U.S. state . . . are *de minimis* in this dispute" because "all alleged abuse occurred in Iraq against Iraqi citizens," Slip Op. at 21, today's decision cuts a much wider swath. It would bar suit even if the victims of the contractors' assaults were fellow Virginians or Californians – including fellow employees of the same contractors. *See, e.g., Jones v. Halliburton Co.*, 625 F. Supp. 2d 339 (S.D. Tex. May 9, 2008) (tort suit by a Texas woman alleging rape by fellow contractor employees in Iraq). Indeed, the decision would bar suit even if the victims were soldiers whom the contractors were hired to support. The rule the court has announced, then, is not truly one in which the "breadth of displacement" of state law is "inversely proportional to state interests." Slip Op. at 21. Rather, and notwithstanding its best intentions, the court has crafted a rule that overrides state interests altogether, regardless of their strength in a given case.

In any event, there are certainly ways short of broad preemption to ensure that a trial court neither asserts jurisdiction over a case that lacks a significant connection with the forum, nor applies the law of a state with no interest in the matter. The doctrine of

forum non conveniens is one such tool.[23] So, too, are the limits that states impose on the extraterritorial reach of their own courts,[24] as well as limitations imposed by the Constitution's Due Process Clause.[25] Indeed, if my colleagues are right about the state interests at stake here, it is possible that one of these doctrines could end these cases without resort to nontextual preemption.

Finally, even if the prospect of applying state laws in this kind of case would present an insurmountable conflict with federal interests, *Boyle* again counsels a different disposition from that which my colleagues adopt. As *Boyle* explained, "where the federal interest requires a uniform rule, the entire body of state law applicable to the area conflicts

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[23] *See, e.g., Torres v. S. Peru Copper Corp.*, 113 F.3d 540, 541 (5th Cir. 1997) (dismissing extraterritorial tort claims under forum non conveniens).

[24] *See, e.g., Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 509-10 (D.C. Cir. 2002) (noting the limits of the District of Columbia's long-arm statute).

[25] *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (barring extraterritorial application of a state's substantive law unless the state has a "significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair"); *see also Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414 (1984) (holding that, for in personam jurisdiction to be asserted over a nonresident corporate defendant, there must be "'certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice'" (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945))).

[with] *and is replaced by federal rules.*" 487 U.S. at 507 (emphasis added). Accordingly, where the Supreme Court finds field preemption appropriate, it does not normally preempt state law and simply leave the field vacant. Instead, it substitutes a federal common law regime.[26] That is what the Court did in *Clearfield Trust Co. v. United States*, the case my colleagues cite as the archetypal example of "field preemption." Slip Op. at 10, 11; *see* 318 U.S. 363, 366-67 (1943) (holding that the rights and obligations of the United States with respect to commercial paper must be governed by a uniform federal rule). It is also what my colleagues' own analysis would dictate. *See* Slip Op. at 13 (arguing that the government's "interest in combat is always 'precisely contrary' to the imposition of a *non-federal* tort duty" (emphasis added)). Yet here, the court simply leaves the field.[27]

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[26] *See, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964) (displacing New York's "act of state" rule because "the scope of the act of state doctrine must be determined according to federal law"); *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 456 (1957) (holding that, because collective bargaining agreements require uniform interpretation, federal law based on "the policy of our national labor laws" must substitute for state law).

[27] The court states that preemption of state law will not leave the plaintiffs "totally bereft of all remedies . . . as they will still retain rights under the Foreign Claims Act." Slip Op. at 14. But plaintiffs have no "rights" under that Act, which merely authorizes designated officials to make (or not make) certain payments as a matter of their unreviewable discretion. 10 U.S.C. §§ 2734, 2735; *see Collins v. United States*, 67 F.3d 284,

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III

For the reasons just stated, the preemption question in these cases should be controlled by *Boyle*, which authorizes displacement of state law only when a federal contract imposes a directly conflicting duty on a contractor. Because there is no such conflict here – indeed, because the duties imposed are congruent rather than incompatible – there is no warrant for preemption.

Nonetheless, I cannot say that my colleagues' arguments in favor of extending *Boyle* to the combatant activities exception lack weight. What I can say, in agreement with them, is that even if we do extend *Boyle*, "the 'scope of displacement' of the preempted non-federal substantive law must be carefully tailored so as to coincide with the bounds of the federal interest being protected." Slip Op. at 14 (quoting *Boyle*, 487 U.S. at 512). Subpart III.A sets out what the appropriate "scope of displacement" would be were we to rely upon the combatant activities exception, and then explains why these cases fall outside that scope. Subpart III.B discusses the problems posed by the essentially untailored test my colleagues apply instead.

286-89 (Fed. Cir. 1995); *Niedbala v. United States*, 37 Fed. Cl. 43, 46, 50 (1996).

A

The FTCA's combatant activities exception preserves the United States' sovereign immunity for "[a]ny claim arising out of the combatant activities of the military or naval forces . . . during time of war." 28 U.S.C. § 2680(j). According to the statutory text, that exception – like the discretionary function exception, the other exceptions, and the FTCA as a whole – applies only in "civil actions . . . against the United States" and only for injuries caused by an "employee of the Government." *Id.* § 1346(b)(1). In light of the FTCA's text, the *Boyle* Court crafted preemption conditions that would assure that the discretionary function in question "was considered by a Government officer, and not merely by the contractor itself." 487 U.S. at 512. If we are to extend *Boyle* to the combatant activities exception, we must demand the same assurance. Hence, for preemption to be appropriate, it must be for "claim[s] arising out of the combatant activities *of the military or naval forces*," 28 U.S.C. § 2680(j) (emphasis added), and not for those arising out of acts performed "by the contractor itself," *Boyle*, 487 U.S. at 512.

How, then, can we tell whether a contractor's conduct actually involved the combatant activities of the military? In this respect, I agree with my colleagues that, at a minimum, the contractor must be "under the military's control." Slip Op. at 12. I disagree, however, as to how to determine the existence of such control. In the military, control is achieved through the chain of command. And the official view

of the U.S. Department of Defense is that private contractors accompanying the Armed Forces in the field are *not* in that chain.

The DOD's position, as set out in its regulations governing "Contractors Accompanying the Force," is that contractors are responsible for the supervision of their own employees and that their personnel are not in the military chain of command. The regulations state:

> The commercial firm(s) providing battlefield support services will perform the necessary supervisory and management functions of their employees. Contractor employees are not under the direct supervision of military personnel in the chain of command.

U.S. DEP'T OF THE ARMY, REG. 715-9, CONTRACTORS ACCOMPANYING THE FORCE § 3-2(f) (1999). The regulations further state: "Contracted support service personnel shall not be supervised or directed by military or Department of the Army (DA) civilian personnel." *Id.* § 3-3(b). Titan's contract with the Army is consistent with this position. *See* Titan Statement of Work § C-1.1 (*Titan* J.A. 386) ("The Contractor shall provide all . . . supervision, and other items and services . . . necessary to provide foreign language interpretation and translation services in support of United States (U.S.) Forces.").[28]

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[28] Titan's contract further states that "[p]ersonnel performing work under this contract shall remain employees of the

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The Army Field Manual on "Contractors on the Battlefield" is, if anything, even more emphatic on these points:

> Management of contractor activities is accomplished through the responsible contracting organization, not the chain of command. Commanders do not have direct control over contractors or their employees (contractor employees are not the same as government employees); only contractors manage, supervise, and give directions to their employees.

U.S. DEP'T OF THE ARMY, FIELD MANUAL 3-100.21, CONTRACTORS ON THE BATTLEFIELD § 1-22 (2003). As the Field Manual further explains:

> It is important to understand that the terms and conditions of the contract establish the relationship between the military (US Government) and the contractor; this relationship does not extend through the contractor supervisor to his employees. Only the contractor can directly supervise its employees. The military chain of command exercises management control through the contract.

Id. § 1-25; *see also id.* § 4-45 ("Maintaining discipline of contractor employees is the responsibility of the contractor's management structure, not the military

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Contractor and will not be considered employees of the Government." *Id.* § C-1.4.1 (*Titan* J.A. 387). CACI's contract states that its employees "are considered non-combatants." CACI Statement of Work ¶ 20(j) (*CACI* J.A. 332).

chain of command. . . . It is the contractor who must take direct responsibility and action for his employee's conduct."); JOINT CHIEFS OF STAFF, JOINT PUB. 4-0, DOCTRINE FOR LOGISTIC SUPPORT OF JOINT OPERATIONS, at V-8 (2000) (*Titan* J.A. 568) (stating that "[c]ontract employees are disciplined by the contractor" and that "[c]ommanders have no penal authority to compel contractor personnel to perform their duties").

In sum, under the existing regulatory regime, contractor personnel are not subject to the command and control of the military. The responsibility for their supervision belongs to their civilian employers. "Management of contractor activities is accomplished through the responsible contracting organization, not the chain of command." FIELD MANUAL 3-100.21, § 1-22. And "[c]ontracted support service personnel shall not be supervised or directed by military or Department of the Army (DA) civilian personnel." ARMY REG. 715-9, § 3-3(b). The government exercises control only "through the contract," FIELD MANUAL 3-100.21, § 1-25, which gives the government no more control than any contracting party has over its counterparty. And that – without more – is not enough to make the conduct of a contractor "the combatant activities *of the military or naval forces*." 28 U.S.C. § 2680(j) (emphasis added).

Of course, the fact that preemption is not warranted by application of the combatant activities exception does not mean that preemption is never warranted. If a plaintiff challenges contractor activity that has been authorized or directed by the military,

preemption by application of the discretionary function exception may result – as it did in *Boyle*. There is no evidence in the record of these cases, however, that the brutality the plaintiffs allege was authorized or directed by the United States.

B

My colleagues reach a different disposition than I do under the combatant activities exception because they employ a different test for preemption. The test they adopt is as follows: "During wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted." Slip Op. at 16. But what does "integrated into" mean? How "integrated" into combatant activities must the contractor be? And what does "retains command authority" mean in light of the DOD regulations discussed above? My colleagues have created a vague and amorphous test and, in so doing, have invited precisely the kind of litigation they fear.

Today's opinion further holds that "the district judge properly focused" not on "the contract terms," but "on the chain of command *and the degree of integration that, in fact, existed* between the military and both contractors' employees." Slip Op. at 7 (emphasis added). But why should that be the proper focus? Why should we ignore the military's own description of its chain of command – as set forth in its

contracts, regulations, and manuals – and instead investigate the facts on the ground? Does this not again invite the wide-ranging judicial inquiry – with affidavits, depositions, and conflicting testimony – that the court rightly abjures? The irony is again evident: we must have a robust contractor defense so as not to interfere with the Executive's conduct of war; but in applying that defense, we do not take the military at its word and instead inquire into the actual operation of its chain of command.

None of these problems are apparent in today's opinion, but that is only because the court does not apply its test to the facts of these cases. Instead, it simply states that "there is no dispute that [the contract employees] were in fact integrated and performing a common mission with the military under ultimate military command." Slip Op. at 11. But there is in fact considerable dispute over whether the contract employees were truly under the military's command at Abu Ghraib. The plaintiffs made that point in this court,[29] and they submitted substantial evidence of lack of military control in the district court.

For example, the plaintiffs submitted an affidavit from the Brigadier General in charge at Abu Ghraib,

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[29] *See, e.g.*, Plaintiffs-Appellants' Br. 25 ("A reasonable jury could certainly find that the [Titan] translators who conspired with CACI employees to abuse Plaintiffs were not under the United States military's command or control.").

who declared: "The Titan translators and other corporate employees were not integrated into the military chain of command. . . . [M]ilitary officials could not give Titan translators and other corporate employees direct orders." Decl. of Brig. Gen. Janis Karpinski ¶ 7 (*Titan* J.A. 725-26). Similarly, an affidavit from a Military Intelligence Specialist at the prison stated: "Titan translators . . . did not act like soldiers, and my unit did not treat them like soldiers. They did not fall within the military chain of command. . . . [W]e had no means of disciplining Titan translators if they did not do what we requested." Decl. of Anthony Lagouranis ¶¶ 11-12 (*Titan* J.A. 733). Affidavits from Titan employees were in accord. A Titan Translator affirmed that: "I received assignments from soldiers, and tried to maintain a good relationship with them, but they could not give me orders. I was employed by Titan – and only Titan could fire me. I did not report to a military chain of command." Decl. of Marwan Mawiri ¶ 9 (*Titan* J.A. 519). And a Titan employee who supervised Titan translators in Iraq declared: "Only the Titan management had the power to supervise and discipline Titan translators. . . . The military could not fire or discipline a Titan employee." Decl. of Thomas Crowley ¶¶ 7-8 (*Titan* J.A. 515).

Needless to say, there was contrary evidence as well. But surely the plaintiffs' testimonial affidavits, alone or in combination with DOD's regulatory and contractual statements, are sufficient to create a genuine issue of material fact. And for that reason,

the defendants are not entitled to judgment as a matter of law at the current stage of this litigation, even under my colleagues' own test. *See* FED. R. CIV. P. 56(c) (providing that summary judgment should be granted only if "there is no genuine issue as to any material fact"); *see also Boyle*, 487 U.S. at 514 (holding that "whether the facts establish the conditions for the [preemption] defense is a question for the jury"). That the court does not reach this conclusion only confirms the breadth of the protective cloak it has cast over the activities of private contractors.[30]

IV

No congressional statute bars the plaintiffs' state-law actions from running their ordinary course in these cases. Indeed, the only cited statute suggests the opposite. No statement of the Executive Branch declares that its interests require dismissal of these cases. Again, the only indications we have from the government are to the contrary. Nor is there any claim that "the state-imposed duty of care that is the asserted basis of the contractor[s'] liability . . . is precisely contrary to the duty imposed by the Government contract," *Boyle*, 487 U.S. at 509, or even that

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[30] Because I conclude that we should permit the state-law claims to go forward at this stage, and because the plaintiffs do not contend that their Alien Tort Statute claims would provide them with different relief, *see* 28 U.S.C. § 1350, I do not address the latter.

the contractors came within the military's view of its chain of command.

Because "[c]ourts should preempt state law only when the justification for preemption is fairly traceable to the foreign policy choices not of the federal courts, but rather of the federal political branches," Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 213, and because the political branches have not made such policy choices evident here, I respectfully dissent.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ILHAM NASSIR IBRAHIM, *et al.*, Plaintiffs, v. TITAN CORPORATION, *et al.*, Defendants.	Civil Action No. 04-1248 (JR)
SALEH, *et al.*, Plaintiffs, v. TITAN CORPORATION, *et al.*, Defendants.	Civil Action No. 05-1165 (JR)

MEMORANDUM ORDER

(Filed Nov. 6, 2007)

Named plaintiffs in both of these cases are Iraqi nationals who allege that they or their late husbands were tortured or otherwise mistreated while detained by the U.S. military at Abu Ghraib and other prisons in Iraq. Defendants are government contractors who provided interpreters (Titan)[1] or

[1] When these suits were originally filed, this defendant was a publicly traded company called The Titan Corporation. In July 2005, L-3 Communications Corporation acquired Titan and renamed it L-3 Communications Titan Corporation. The renamed entity is now a wholly owned subsidiary of L-3 Communications

(Continued on following page)

interrogators (CACI)[2] to the U.S. military in Iraq. The defendants have moved for summary judgment, asserting that plaintiffs' common law tort claims should be preempted under the government contractor defense.

Background

A. Procedural History

On August 12, 2005, I dismissed the *Ibrahim* plaintiffs' claims under the Alien Tort Statute, RICO, various international laws and agreements, and U.S. contracting laws. I also dismissed their common law claims for false imprisonment and conversion. This left the plaintiffs with four common law claims: assault and battery, wrongful death and survival, intentional infliction of emotional distress, and negligence. Defendants urged that those claims be dismissed as well, arguing that they should be preempted under an extension of the government contractor defense. I concluded that the defendants had not produced sufficient factual support at that stage of the record's development to justify the application of this affirmative defense. Limited discovery was

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Corporation. Regardless of the name under which it was then operating, I will refer to this defendant as Titan throughout.

[2] The *Saleh* plaintiffs have sued both CACI Premier Technologies, Inc., and its parent company, CACI International, Inc. The *Ibrahim* plaintiffs have only brought claims against CACI Premier Technologies, Inc. For simplicity's sake, in this opinion I will refer to both defendants as CACI.

needed on the question of whether defendants' employees "were essentially acting as soldiers," and I asked, "What were [the defendants'] contractual responsibilities? To whom did [their employees] report? How were they supervised? What were the structures of command and control?" *Ibrahim v. Titan Corp.*, 391 F. Supp.2d 10, 19 (D.D.C. 2005). On June 26, 2006, I dismissed the *Saleh* plaintiffs' federal claims. *Saleh v. Titan Corp.*, 436 F. Supp.2d 55, 57-59 (D.D.C. 2006). That disposition rendered *Saleh* virtually indistinguishable from *Ibrahim*, because the *Saleh* plaintiffs also bring a number of common law claims, including assault and battery, sexual assault, wrongful death, negligent hiring and supervision, and intentional and negligent infliction of emotional distress. The cases were consolidated for discovery purposes only.

B. Legal Framework

In *Boyle v. United Technologies Corporation*, 487 U.S. 500 (1992), the Supreme Court laid out a general framework for identifying whether state law tort claims brought against military contractors should be preempted by judge-made federal common law. First, the court must determine whether "uniquely federal interests" are at stake. *Id.* at 504-07. Second, the court must determine whether the application of state tort law would produce a "significant conflict" with federal policies or interests. *Id.* at 507-13.

In the August 12, 2005, opinion in *Saleh*, I concluded that the treatment of prisoners during wartime undoubtedly implicates uniquely federal interests. As *Boyle* instructs, I looked to the Federal Tort Claims Act (FTCA) for guidance on the question of whether allowing these suits to go forward would produce a significant conflict with identifiable federal policies or interests. The defendants urged that plaintiffs' claims conflict with the federal interests embodied in the FTCA's combatant activities exception, which bars suit against the federal government for "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j). As explained by the Ninth Circuit in *Koohi v. United States*, the purpose of that exception "is to recognize that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action." 976 F.2d 1328, 1337 (9th Cir. 1992).

In *Koohi*, as in *Boyle*, the preempted tort claims were for products liability. There was, and is, no controlling authority applying the combatant activities exception to the tortious acts or omissions of civilian contractors in the course of rendering services during "wartime encounters."[3] I concluded that

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[3] Other district courts have limited the preemptive effect of the government contractor defense to the products liability context. *See, e.g., McMahon v. Presidential Airways Inc.*, 460 F. Supp.2d 1315, 1331 (M.D. Fla. 2006); *Fisher v. Halliburton,*

(Continued on following page)

plaintiffs' state tort claims would be preempted if the defendants could show that their employees at Abu Ghraib functioned as soldiers in all but name.[4] Discovery and briefing in this case have allowed sharper definition of the showing necessary for preemption pursuant to the FTCA's combatant activities exception. As a threshold matter, defendants must have been engaged in "activities both necessary to and in direct connection with actual hostilities." *United States v. Johnson*, 170 F.2d 767, 770 (9th Cir. 1948). If this was the case, the combatant activities exception will preempt state law only when defendants' employees were acting under the direct command and exclusive operational control of the military chain of command.

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390 F. Supp.2d 610, 615 (S.D. Tex. 2005). The Eleventh Circuit has, however, applied the government contractor defense to preempt tort claims that arose out of a contract for services. *Hudgens v. Bell Helicopters*, 328 F.3d 1329, 1345 (11th Cir. 2003) (discretionary function exception applied to preempt claims that defendant negligently serviced and maintained a military helicopter). According to the *Hudgens* court, preemption does not depend on what type of contract the defendant had with the military (*i.e.*, one for goods or one for services). Instead, "the question is whether subjecting a contractor to liability under state tort law would create a significant conflict with a unique federal interest." *Id.* at 1334.

[4] Some of the abuse alleged by the *Saleh* plaintiffs occurred at locations other than Abu Ghraib. None of the parties have argued that where the abuse occurred is significant for preemption purposes.

That test follows the approach to federal interest preemption that the Supreme Court set forth in *Boyle*. *Boyle* explains that the "scope of displacement" of state law must be tailored to the scope of the federal interest being protected. In that case, the estate of a Marine helicopter pilot sued the private helicopter manufacturer for wrongful death caused by alleged design defects. The plaintiff's allegations focused on the function of the helicopter's escape hatch, which was designed according to government specifications. Among the defects alleged was the fact that the escape hatch opened out, rather than in, making it ineffective when the craft crashed in water. After finding that uniquely federal interests were at stake-including the rights and obligations of the United States under its contracts – the Supreme Court concluded that the imposition of state tort liability would conflict with the discretionary function exception to the FTCA. *See* 28 U.S.C. § 1346(b) (barring suits against the United States that are "based upon exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused"). As the Supreme Court explained, "the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision." *Boyle*, 487 U.S. at 511. In order to preserve the federal interests embodied by the discretionary function exception, the Supreme Court set out a three-part test to determine when this

federal interest requires the displacement of state law. Military contractors cannot be held liable under state law for design defects when: 1) the United States approved reasonably precise specifications; 2) the equipment conformed to those specifications; and 3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. *Id.* at 512. *Boyle's* three factors ensure that state law will be preempted only when "the suit is within the area where the policy of the 'discretionary function' would be frustrated – *i.e.*, they assure that the design feature in question was considered by a Government officer and not merely by the contractor itself." *Id.*

The federal interest at stake in the present case is embodied, not by the discretionary function exception, but by the combatant activities exception. In such a case a different test for preemption must be used to ensure that any displacement of state law will also be commensurate with the scope of the federal interest at issue. The policy underlying the FTCA's combatant activities exception is that the military ought be "free from the hindrance of a possible damage suit" based on its conduct of battlefield activities. *Johnson*, 170 F.2d at 769. In this respect, the policy echoes the Supreme Court's admonition that "[i]t would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive

abroad to the legal defensive at home." *Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950).

Although preemption pursuant to the combatant activities exception relieves the contractor of liability, this effect is incidental to the real function of preemption, which is to shield military combat decisions from state law regulation. This function is seen in the way the exception operates under the FTCA. As applied to the military, this reservation of sovereign immunity ensures that state law will not interfere with an officer's authority, pursuant to the military chain of command, to give legally binding orders to his subordinates. In other words, the exception eliminates the possibility that state law liability could cause a soldier to second-guess a direct order.

In context of preemption, the federal interest embodied by the exception is the same. Where contract employees are under the direct command and exclusive operational control of the military chain of command such that they are functionally serving as soldiers, preemption ensures that they need not weigh the consequences of obeying military orders against the possibility of exposure to state law liability. It is the military chain of command that the FTCA's combatant activities exception serves to safeguard, however, and common law claims against private contractors will be preempted only to the extent necessary to insulate *military* decisions from state law regulation. This is why the degree of operational control exercised by the military over

contract employees is dispositive. When the military allows private contractors to retain authority to oversee and manage their employees' job performance on the battlefield, no federal interest supports relieving those contractors of their state law obligations to select, train, and supervise their employees properly.

The government contractor defense is an affirmative defense, so the burden is on defendants to show that they meet the requirements for preemption. Whether they have done so is ultimately a question of fact for the jury. *See Boyle*, 487 U.S. at 514. When the defense is put forward on a motion for summary judgment, as defendants have done here, the factual showing required is a demanding one. On a motion for summary judgment, the question is not whether the defendants have submitted evidence sufficient to allow a jury to apply the defense. The question is instead whether the defendants are "entitled to judgment as a matter of law, *i.e.*, whether no reasonable jury could fail to find that the defense ha[s] been established." *Snell v. Bell Helicopter Textron, Inc.*, 107 F.3d 744, 746 (9th Cir. 1997). In other words, defendants' motions for summary judgment must be denied if plaintiffs have raised a genuine question of material fact as to whether the defendants' employees were acting under the direct command and exclusive operational control of the military chain of command.

C. Factual Background

1. Titan

In 1999, the U.S. Army awarded a contract to Titan's corporate predecessor for the provision of civilian linguists. Def.'s Ex. 1, Hopkins Decl. at ¶ 10. This contract did not request a set number of linguists but instead allowed for individual delivery orders to be made as the need arose. Such needs became quite urgent following the deployment of military personnel into Iraq and Afghanistan. The military could not provide for the large number of linguists that were needed, so it turned to Titan to recruit civilian linguists who were to be "directly attached to units deployed to Afghanistan and Iraq in support of U.S. military combat operations." Hopkins Decl. at ¶ 11. Titan provided linguists to the military in Iraq under a series of delivery orders, each of which contained a materially similar "Statement of Work" providing the terms of the relationship between Titan and the military. Def.'s Resp. to Pls.' Statement of Material Facts at ¶ 3.

According to the Statement of Work, Titan was to provide "all personnel, equipment, tools, material, *supervision,* and other items and services . . . necessary to provide foreign language interpretation and translation services in support of" military operations in the Persian Gulf region. Statement of Work at C-1.1, Ex. A to Hopkins Decl. (emphasis added). The type of supervision required under the contract is not defined. For example, the contract does not make

clear whether the military expected Titan to provide only administrative supervision of its employees (*i.e.*, delivering linguists to their assigned units and facilitating their payment), or whether Titan was also to provide operational supervision (*i.e.*, overseeing linguists' day-to-day performance of translation duties). The agreement did make clear, however, that "[c]ontractor personnel must adhere to the standards of conduct established by the operational or unit commander." Statement of Work at C-1.8.4.

The Statement of Work required Titan to have an "on-site representative" available to the Administrative Contracting Officer or the Contracting Officer's Representative (COR), the military officials who were to be Titan's point of contact with the military on the ground. Statement of Work at C-1.3.2. In practice, however, Titan's "site managers" were not generally on-site with the linguists that they managed. For example, in December 2003, Titan's Iraq operations employed 28 site managers for 3052 linguists. According to Titan's Director for Operations, Kevin S. Hopkins, this ratio meant that "site managers often found it difficult to see all of their linguists more than once a week, if that." Hopkins Decl. at ¶ 14. From October 2003 until January 2004, Titan's site manager for Abu Ghraib was David Winkler. Def.'s Ex. 3, Winkler Decl. at ¶ 1. Winkler lived in the Green Zone in Baghdad and would escort newly arriving linguists to the facility to which they had been assigned. This initial assignment was done not by Titan but by the military. Major John Scott

Harris oversaw the assignment of both military and civilian linguists within Iraq. *Id.* at ¶ 51. According to Winkler, once Titan linguists were on-site, their work assignments "were under the exclusive direction and control of the military unit commander or the OIC/NCOIC." *Id.* at ¶ 41. Winkler explained that this meant that Titan linguists were subject to their military unit commander's tasking "24 hours per day, seven days per week. . . . Titan supervisors played no role in the tasking of linguists or in supervising their work performance." *Id.* During the period of November 2003 through January 2004, Winkler visited the 30-40 U.S. citizen Titan linguists employed at Abu Ghraib "about 2-3 times per week." *Id.* at ¶ 46. During these visits he was "prohibited by the military from observing linguists performing their duties or from discussing their interrogations." *Id.* at ¶ 36. Instead, Winkler would check in with each linguist to see how he or she personally was getting along and would deal with issues relating to benefits and pay. Winkler Depo. at 44. Winkler also "spoke periodically" with the military commanders of the units to which Titan linguists were assigned. Winkler Decl. at ¶ 3. Military officials sometimes approached Winkler when "personality conflicts" with linguists had arisen. Winkler's approach to such situations was to

> discuss the matter with the linguists, remind them that they work for the military. They take their orders from the military. If there was something which was nothing more than a misunderstanding, I would try to clear that

> up. And then I would talk to the NCOIC or OIC or their first-line [military] supervision, as the case may be, and explain what I had ascertained to be the truth from the linguist's point of view and then allowed them to work things out accordingly.

Winkler Depo. at 46-47.

At Abu Ghraib, Chief Warrant 3 Officer Douglas Rumminger of the U.S. Army Reserve "oversaw the linguist program." Def.'s Ex. 2, Rumminger Decl. at ¶ 2. While there were "a few" military linguists at Abu Ghraib, most of the linguists at the facility were contracted from Titan. *Id.* at ¶ 36. In his declaration, Rumminger explained that he was responsible for "the indoctrination of new Titan linguists to [Abu Ghraib]; delivery of the linguist to one of the various teams operating at [Abu Ghraib], and, after assignment to a team, helping oversee the well being of the Titan linguists." *Id.* at ¶ 2.

Upon arrival at Abu Ghraib, Rumminger spent about thirty minutes with each Titan linguist to explain "what was authorized by the interrogation policies and what was prohibited." *Id.* at ¶ 38. Linguists were then required to sign two documents: one on the interrogation rules of engagement and a "memorandum of understanding with the unit." *Id.* at ¶ 39, attached at Rumminger Decl., Ex. A. This memorandum explained the military's expectations relating to linguists' job performance. For example, the memorandum stressed the importance of conducting word for word translations and mirroring the

interrogators' voice inflection and choice of words. Explaining that "it is not the translator's place to second guess the interrogator and refuse to translate words or phrases," the memorandum stated that at no time should linguists and interrogators argue in front of a detainee. Rumminger Decl., Ex. A. Initially drafted for use in Afghanistan, this memorandum was modified by Rumminger for use at Abu Ghraib. Titan had no input into the document.

Through daily planning meetings in which Titan supervisors did not participate, Rumminger assigned linguists to specific interrogations. Once linguists were assigned to interrogation teams, those teams were free "to assign their linguists as they saw fit without seeking permission from Titan or other military authorities." Rumminger Decl. at ¶ 21. When linguist shortfalls occurred at Abu Ghraib, interrogation teams negotiated among themselves the borrowing of a Titan linguist from one team to another. This process took place without any consultation with Titan supervisors. *Id.* at ¶ 37.

Military unit commanders had to sign off on any requests for leave by Titan linguists. Rumminger explained that this rule was strictly enforced at Abu Ghraib: he recalled "a particular incident in which four linguists were removed on the spot by a senior military commander for being absent without leave when they were caught returning to the [Abu Ghraib] compound." *Id.* at ¶ 51. Titan was not consulted in advance of this removal. The Statement of Work itself provided that the military's contracting officer could

"require [Titan] to remove . . . any employee for reasons of misconduct, security, or [when] found to be or suspected to be under the influence of alcohol, drugs, or other incapacitating agent." Statement of Work, C-1.5.

2. CACI

CACI provided interrogators at Abu Ghraib under two delivery orders, Delivery Order 35 and Delivery Order 71. Def.'s Ex. 1, Billings Decl. at ¶ 13. The Statement of Work for Delivery Order 35 asserted that personnel hired for these interrogator positions would be "integrated into" various intelligence and interrogation teams, Billings Decl., Ex. A at ¶ 4, but it also provided that "[t]he Contractor is responsible for providing supervision for all contract personnel." *Id.* at ¶ 5. Delivery Order 71 does not contain this same language regarding contractor supervision; instead it states that contracted personnel (including interrogators) will perform "under the direction and control of the unit's MI chain of command or Brigade S2, as determined by the supported command." Billings Decl., Ex. B at ¶ 3. Unlike the Titan Statement of Work, the CACI Statements of Work make no mention of any procedures for having contract employees removed at the direction of the Contracting Officer.

Lieutenant Colonel Eugene Davis of the United States Army was the Contracting Officer's Representative for the contract under which CACI provided

interrogators. Lt. Col. Daniels stated that "in coordination with CACI representatives," he assigned contract interrogators to posts throughout Iraq, including at Abu Ghraib. Def.'s Ex. 5, Daniel Decl. at ¶ 2. Once contract interrogators arrived at their assigned locations, Ltc. Daniels stated, "a CACI site manager would assign them to military interrogation units or teams." *Id.*

The CACI site manager for interrogators at Abu Ghraib from October 2003 to March 2004 was Daniel Porvaznik. Def.'s Ex. 2, Porvaznik Decl. at ¶ 3. Porvaznik himself was stationed at Abu Ghraib. In his deposition Porvaznik stated that, as part of his "site lead managerial duties," he interviewed newly arrived contract interrogators "at great length" to get a sense of their skill sets and backgrounds. Porvaznik Depo. at 131-32. Porvaznik worked closely with the officer in charge of the Interrogation Control Element, Capt. Carolyn Wood. After familiarizing himself with the skills of newly arrived CACI interrogators, Porvaznik "provided [Capt. Wood] with input" about each interrogator's background, input that she used in deciding how to deploy these contract employees. *Id.* at 137.

Porvaznik's involvement with the substance of contract interrogators' work continued after their initial assignments. In his role as site lead, Porvaznik had daily conversations with Capt. Wood about "how my people were doing or not doing." *Id.* at 138. Porvaznik observed a number of interrogations and said that he "absolutely" would have stopped any

interrogation which involved physical abuse. *Id.* at 143. He agreed that stopping abuse was among his job responsibilities as site manager; in his words it was "part of quality control." *Id.* at 143-44. Porvaznik explained that all CACI employees had a duty to report any abuse they saw both to him as the CACI representative, and to the military; he agreed that CACI interrogators effectively had a "double duty" to report abuse. *Id.* at 146.

In addition to observing interrogations, Porvaznik advised CACI interrogators on different approaches that they might try; he would advise them as to whether he thought that their planned approach was a "good idea, [or a] bad idea." *Id.* at 161. Porvaznik could not give final approval to a particular interrogation plan. Both contract and military interrogators were to submit such plans to the military personnel in the Interrogation Control Element for ultimate approval. *Id.* at 162. In his capacity as site lead, however, Porvaznik did have the authority to prohibit a contract interrogator from pursuing an interrogation plan that he felt was not consistent with the CACI Code of Ethics. *Id.* at 185. If a contract interrogator ignored a direct order from Porvaznik, termination was among the potential consequences. *Id.*

While Porvaznik did not see "most" of the submitted interrogation plans, he testified that he did see a "goodly amount" of those written up by CACI contractors. *Id.* at 167. Beyond reading interrogation plans for himself, Porvaznik testified that he would

speak to military personnel who were working directly with CACI personnel in order to elicit feedback on CACI interrogators' performance. *Id.* at 168.

Analysis

Titan

Serving as a translator for the interrogation of persons detained by the U.S. military in a combat zone is an activity that clearly has a "direct connection with actual hostilities." Titan therefore satisfies the threshold inquiry for potential application of the combatant activities exception. The dispositive question here is whether the undisputed facts show that Titan's interpreters were under the direct command and exclusive operational control of the military chain of command.

Plaintiffs make two different types of argument in support of their contention that the claims against Titan should not be preempted. First, the plaintiffs attempt to shift the focus away from the question of operational control by arguing that the military is not permitted to directly supervise contract employees. There is no question that, as a general matter, Army policy places significant limits on the way that contract personnel are to be used and supervised. For example, Army Regulation 715-9 provides that "Contracted support service personnel shall not be supervised or directed by military or Department of Army civilian personnel. Instead . . . the Contracting

Officer's Representation [COR] shall communicate the Army's requirements and prioritize the contractor's activities within the terms and conditions of the contract." Contractors Accompanying the Force, Army Reg. 715-9 (Oct. 29, 1999), Pls.' Ex. C-3. Likewise, a 2003 Army Field Manual provides that:

> Only the contractor can directly supervise its employees. The military chain of command exercises management control through the contract. The military link to the contractor, through the terms and conditions of the contract, is the contracting officer or the duly appointed COR, who communicates the commander's specific needs to the contractor, when the requirement has already been placed on the contract.

Contractors on the Battlefield, FM 3-100.21, Headquarters of Department of the Army, at 1-25, 1-26 (Jan. 2003), Pls.' Ex. C-4. Whether Titan should have provided more or a different kind of supervision is not, however, the issue before the court. Instead, the proper focus is on the structures of supervision that the military actually adopted on the ground.

Plaintiffs also argue that they have raised material issues of genuine fact as to the military's authority over Titan contractors. For example, plaintiffs point to the declaration of an Army interrogator who was stationed at Abu Ghraib, Anthony Lagouranis, that two Titan linguists assigned to his team transferred to other locations without seeking or receiving permission from the military's team

leader. *See* Pls.' Ex. A-4, Lagouranis Decl. at ¶ 20. Although such testimony potentially contradicts Winkler's statement that Titan played "no role in the tasking of linguists," the contradiction is immaterial. That Titan reassigned linguists without coordinating such reassignment with the military does not show that the military shared *operational* command and control of the linguists with Titan. Moving linguists from location to location involves administrative oversight; there is nothing in this record to suggest that it has to do with operational control of linguists' duties. The facts as to operational control of linguists' job performance are uncontradicted: the military, and not Titan, gave all the orders that determined how linguists performed their duties. Although the record contains a declaration to the effect that Titan linguists did not always follow military orders, *see* Pls.' Ex. A-5, Marwan Mawiri Decl. at ¶ 10, the insubordination of some linguists does not change the fact that it was the military, and not Titan, that exerted operational control over contract linguists.

Titan has shown that its linguists were fully integrated into the military units to which they were assigned and that they performed their duties under the direct command and exclusive operational control of military personnel. No genuine issue of material fact has been identified that might support the opposite conclusion. Titan's motions for summary judgment will accordingly be granted.

CACI

There can be no question that the nature and circumstances of the activities that CACI employees were engaged in – interrogation of detainees in a war zone – meet the threshold requirement for preemption pursuant to the combatant activities exception. However, the facts regarding military control of CACI interrogators differ considerably from those regarding Titan.

From the deposition testimony of site manager Daniel Porvaznik, a reasonable jury could conclude that he effectively co-managed contract interrogators, giving them advice and feedback on the performance of their duties. The trier of fact could also conclude, contrary to CACI's assertion, that "the responsibilities, supervision, and reporting requirements of CACI PT interrogators" were *not* "identical to those of their military counterparts." Def.'s Mot. for Summ. J. at 8. Unlike military interrogators, CACI interrogators were supervised by both Mr. Porvaznik and Capt. Wood. Also unlike military interrogators, CACI interrogators had a requirement to report abuse not only up the military chain of command but also to CACI. Moreover, Porvaznik had the authority to direct CACI interrogators not to carry out an interrogation plan that was inconsistent with company policy. Military interrogators were not subject to this kind of dual oversight.

These facts can reasonably be construed as showing that CACI interrogators were subject to a

dual chain of command, with significant independent authority retained by CACI supervisors. When the facts are construed in this manner, no federal interest requires that CACI be relieved of state law liability.

Conclusion

The critical differences between the ways that contract translators and contract interrogators were managed and supervised lead to different outcomes. Because the facts on the ground show that Titan linguists performed their duties under the exclusive operational control of the military, the remaining state law claims against Titan are preempted and must be dismissed. Because a reasonable trier of fact could conclude that CACI retained significant authority to manage its employees, however, I am unable to conclude at this summary judgment stage that the federal interest underlying the combatant activities exception requires the preemption of state tort claims against CACI. This does not mean that CACI may not successfully prove this affirmative defense at trial, but the task of sorting through the disputed facts regarding the military's command and control of CACI's employees will be for the jury.

* * *

For the foregoing reasons, it is

ORDERED that Titan's motions for summary judgment [#75 in 05-1165 and #56 in 04-1248] are **granted**, and that CACI's motions for summary

judgment [#79 in 05-1165 and #54 in 04-1248] are **denied**; it is

FURTHER ORDERED that the Clerk set a status conference for a date and time convenient for the parties approximately 30 days after the date of this memorandum order.

JAMES ROBERTSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SALEH, *et al.*, Plaintiffs, v. TITAN CORPORATION, *et al.*, Defendants.	:	Civil Action No. 05-1165 (JR)

MEMORANDUM ORDER

(Filed Jun. 29, 2006)

In this vexed lawsuit,[1] a number of named Iraqi nationals bring allegations of nearly unspeakable acts of torture and other mistreatment by interpreters and interrogators who were civilian employees of American corporations doing contract work for the U.S. military at Abu Ghraib prison in Baghdad. Before this court are five motions to dismiss plaintiffs' third amended complaint ("complaint"), filed on behalf of

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[1] The adjective refers to an unfortunate history of relations among counsel for plaintiffs in the related case of *Ibrahim v. Titan Corporation*, Civil Action No. 04-1248, and to this case's odyssey from the Southern District of California, to the Eastern District of Virginia, to this court, back to the Eastern District of Virginia, and finally back here on January 24, 2006. That history is not germane to the present motions but is a matter of public record. *See* No. 04-1248, docket entries [26], [32], [34], [35], [52]; and, in the instant case, docket entries [7], [8], [19], [27], and minute entries of 9/16/05 and 10/25/05.

all the defendants who have been served,[2] and a motion by plaintiffs for summary judgment on one of the defenses interposed by one defendant.

The plaintiffs are twelve named Iraqis, the estate of a thirteenth, and 1050 unnamed Does comprising "classes of persons similarly situated." The lead named plaintiff Saleh is "an individual residing in Sweden and Dearborn, Michigan." The other plaintiffs are all residents of Iraq. Defendants/movants are three individuals, John B. Israel, Adel L. Nakhla, and Steven A. Stefanowicz, and two corporate government contract firms, CACI Premier Technology, Inc. (together with related corporate entities) and L-3 Communications Titan Corporation (formerly known as The Titan Corporation).

This case is related to the *Ibrahim* case, *see* note 1, *supra,* because, except for the allegations of conspiracy made in this case, the factual allegations of the two cases are virtually indistinguishable from one another. Both cases involve the same corporate defendants, allegedly doing (or negligently allowing to be done, or failing to prevent) the same kinds of acts, in the same place, at the same time. In *Ibrahim,* I dismissed the plaintiffs' Alien Tort Statute, RICO, and government contracting claims, as well as plaintiffs' common law claims of false imprisonment and conversion, but I allowed their common law

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[2] Proof of service upon defendant Timothy Duggan was filed on 6/27/06. This memorandum order does not apply to him.

claims of assault and battery, wrongful death, intentional infliction of emotional distress and negligence to go forward, finding no merit in the defendants' political question defense and finding that the defendants had not provided enough factual support for their government contractor preemption defense. *Ibrahim,* 391 F.Supp.2d 10 (D.D.C. 2005)

Apparently assuming (correctly) that I would treat my *Ibrahim* decision as if it were *stare decisis,* each side in the present case has attempted to distinguish it. Plaintiffs have broken their ATS claim into component parts, added claims of aiding and abetting and conspiracy, added individual defendants, named three putative subclasses of plaintiffs (the "RICO" class, the "common law" class, and the "wrongful death" class), and fashioned legal arguments that were not addressed in *Ibrahim.* CACI and Titan, for their part, have argued that plaintiffs' arguments have laid even their common law claims open to dismissal. For reasons that will be amplified below, however, I find no reason to treat any of the claims and defenses asserted in this case differently from the way they were treated in *Ibrahim.* (The reasoning supporting my rulings in *Ibrahim* is incorporated by reference here.)

1. Alien Tort Statute

In *Ibrahim,* I held that, after *Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774 (D.C. Cir. 1984), *Sanchez-Espinoza v. Reagan,* 770 F.2d 202 (D.C. Cir.

1985), and *Sosa v. Alvarez-Machain*, 124 S. Ct. 27, 39 (2004), it was clear that I had jurisdiction under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, but that the conduct of private parties described by plaintiffs' allegations was not actionable under the ATS's grant of jurisdiction as violative of the law of nations. The plaintiffs in this case, apparently thinking they see daylight in footnote 3 of the *Ibrahim* opinion, have run to it, arguing that the Supreme Court's *Sosa* opinion approved Judge Edwards's view in *Tel-Oren*, 726 F.2d at 781, that torture by private parties would be actionable under the ATS if the private parties were acting under color of law, and alleging that these defendants were indeed acting under color of law. The argument is rejected. *Sanchez-Espinoza* is controlling Circuit precedent and is not cast in doubt by the other cases upon which plaintiff relies.[3] *Sosa* did not overrule that precedent (and *Sosa's* pointed admonition that lower federal courts should be extremely cautious about discovering new offenses among the law of nations certainly cannot be read as an endorsement of Judge Edwards' view in *Tel-Oren* that "the law of nations is not stagnant and should be construed as it exists today among the nations of the

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[3] The scholarly and persuasive opinion of Judge Schwartz in *Presbyterian Church of Sudan v. Talisman Energy*, 244 F. Supp 2d 289 (S.D.N.Y. 2003), involved a Canadian corporation acting under color of Sudanese law and relied heavily upon Second Circuit precedent laid down in *Kadic v. Karadzic*, 70 F.3d 232 (1995), and *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980), both of which involved acts done under color of non-U.S. law.

world." 726 F.2d at 777). *Sanchez-Espinoza* makes it clear that there is no middle ground between private action and government action, at least for purposes of the Alien Tort Statute.

Plaintiffs' color of law theory is not advanced by their assertions that the defendants aided and abetted official action, Complaint ¶¶ 189, 206, 221, 236, 250, or that they conspired with military personnel, Complaint ¶¶ 183, 201, 216, 231, 245. It is certainly true, *see* [42-1] at 15,[4] that participation in a conspiracy with government actors does not confer government immunities,[5] but in the absence of supporting citation it is difficult to see how conspiratorial behavior, which by definition is secretive, can show the color of law. And the more plaintiffs assert official complicity in the acts of which they complain, the closer they sail to the jurisdictional limitation of the political question doctrine. *See, Gonzalez-Vera v. Kissinger,* No. 05-5017 (D.C. Cir., decided June 9, 2006); *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005).

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[4] Citation to an electronic document is to the page number of the original document, rather than the number assigned by the CM/ECF system.

[5] On this motion to dismiss, plaintiff's allegations of conspiracy are taken as true.

2. RICO

I dismissed the RICO claims in *Ibrahim* because allegations of personal injuries alone are not sufficient to meet RICO's standing requirement of some allegation of damage to business or property, 18 U.S.C. § 1964(c). Here, seeking to avoid the same result, the plaintiffs claim that they were victims of predicate acts of robbery, but their allegations – that three of them were robbed upon their arrest by unnamed American soldiers, complaint ¶¶ 131, 140, 151, or that (upon information and belief) an unnamed employee of Titan stole and never returned a Mercedes automobile owned by an unnamed class member, *id.* ¶ 55 – are vague to the point of rumor. Plaintiffs concede that the alleged takings of property occurred at the time of arrest, not during interrogation. They nevertheless insist, [42-1] at 27, that

> only at the time of release from prison did seizure of money and goods become robbery; the initial *taking* does not establish who *stole* it. Regardless of timing, the robberies were as much part of the attempt to intimidate and demean the prisoners as any other act of torture and abuse.

Unfortunately, there is no "artful pleading" exception to the rule that the allegations of a complaint must be taken as true when considering a motion to dismiss. Here, however, even assuming the truth of plaintiffs' allegations that the unnamed persons (maybe American soldiers, maybe not) who arrested the plaintiffs (where? when?) stole their money, jewels and

automobiles to intimidate and demean them, all in order to further the unlawful purposes of the vast "torture conspiracy" plaintiffs have conjured, complaint ¶¶ 97-107, the resulting (and quite fantastic) plot line describes a theory of injury causation that is too attenuated for RICO. *Cf. Anza v. Ideal Steel Supply Corp.*, ___ U.S. ___, decided June 5, 2006.

3. CACI International Inc and CACI, INC.-FEDERAL.

The leave given plaintiffs to file their (third amended) complaint against three CACI corporate entities [33] was conditional. They were to

> make[ ] allegations as to the individual CACI corporations now lumped together in the proposed third amended complaint as "the CACI Corporate defendants" . . . specific enough that such allegations may be tested against the requirement of Rule 11 that they "have evidentiary support, or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."

Instead of doing so, plaintiffs simply added a footnote, complaint ¶ 24, explaining that their allegations as to CACI International Inc and CACI, INC.-FEDERAL were now made

> upon information and belief . . . to connote those instances where Plaintiffs believe the allegations are likely to have evidentiary

> support after a reasonable opportunity for further investigation or discovery.

Asserting that they have now "alleged facts establishing liability for each of the CACI entities," [41-1] at 41, the plaintiffs have thrown together a number of claims that sound in negligence (knew or should have known, allowed employees to design illegal interrogation, failure to prevent or stop, etc., *see id.* at 42) or agency (CACI International "controlled" CACI-PT and acquired it to meet its own strategic goals, *id.*), none of which, even if proven, would "pierce the corporate veil" so as to make the corporate parents of CACI-PT liable for the torts of CACI-PT. The complaint asserts Alien Tort Statute claims for extrajudicial killing, torture, cruel/inhuman/degrading treatment, war crimes, and crimes against humanity, as well as common law claims for assault and battery, sexual assault, wrongful death, negligent hiring and supervision, and intentional and negligent infliction of emotional distress. The claims that might be supported by proof of negligence (wrongful death, negligent hiring and supervision, negligent infliction of emotional distress) all are variants of intentional tort claims. Plaintiffs will have a hard enough time establishing CACI-PT's respondeat superior liability for these torts. If they choose to pursue their claims against CACI-PT's corporate parents, they (and their counsel) are on notice that I will permit discovery as to exactly what "evidentiary support" existed for their claims when they filed their (third amended) complaint, and, for those claims asserted upon

information and belief, exactly what information they acted upon.

4. Individual defendants

The motions of defendants Israel, Nakhla, and Stefanowicz to dismiss for lack of personal jurisdiction will be granted. None of them lives in the District of Columbia or has meaningful contacts here, and plaintiffs have made no attempt to invoke the District of Columbia's long-arm statute as to any of them. The arguments for personal jurisdiction are that RICO supports nationwide service of process and that the jurisdictional question has already been decided, by the United States District Court for the Eastern District of Virginia. A properly pleaded RICO claim does support nationwide service of process, but these defendants need not respond to a RICO claim that plaintiffs have no standing to pursue. Judge Hilton's referral to this court [44-14] was not an adjudication of the RICO standing issue.

5. Further proceedings

The disposition of the present motions renders this case, and its procedural posture, virtually indistinguishable from *Ibrahim*. Here, as in *Ibrahim*, the next step must be to determine whether the defendants' employees "were essentially acting as soldiers," *see* No. 04-1248 [39] at 16-18. In *Ibrahim*, the defendants moved for summary judgment on that question, after which the parties embarked on an

agreed discovery program, No. 04-1248 [63]. It will be in the interest of justice, and of the efficient use of litigation resources, for these two cases to be consolidated, *for discovery purposes only*. Defendants will not be required to duplicate the discovery they have provided in *Ibrahim*, if plaintiffs in the instant case are given access to the same discovery, under the terms of the protective order issued in that case, No. 04-1248 [66].

* * *

For the reasons set forth above and in No. 04-1248 [38] it is

ORDERED that the motions of Stephen A. Stefanowicz [36], John B. Israel [38] and Adel Nahkla [39] to dismiss for lack of personal jurisdiction are **granted.** It is

FURTHER ORDERED that the motions of CACI Premier Technology, Inc., CACI International Inc and CACI, INC.-FEDERAL [37] and L-3 Communications Titan Corporation [40] to dismiss for failure to state a claim upon which relief can be granted are **granted** as to Counts One through Fifteen, Thirty and Thirty-one of the Third Amended Complaint [34] and **denied** as to Counts Sixteen through Twenty-nine. It is

FURTHER ORDERED that plaintiffs' motion for summary judgment against Titan Corporation on the government contractor defense [61] is **denied**. And it is

FURTHER ORDERED that the parties meet and confer and present a proposed schedule for further proceedings – an agreed schedule, if possible – within 30 days of the date of this order.

JAMES ROBERTSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ILHAM NASSIR IBRAHIM, *et al.*, Plaintiffs, v. TITAN CORPORATION, *et al.*, Defendants.	Civil Action No. 04-1248 (JR)

MEMORANDUM

(Filed Aug. 12, 2005)

Plaintiffs sue seeking compensation from two private government contractors for alleged acts of torture inflicted upon them at the Abu Ghraib prison in Iraq. Defendants move to dismiss on a number of grounds. Their motion must be granted as to most counts. It will be denied however, as to several of plaintiffs' common law claims.

Background

Plaintiffs are seven Iraqi nationals who allege that they or their late husbands were tortured while detained by the U.S. military at the Abu Ghraib prison in Iraq. Defendants are private government contractors who provided interpreters (Titan) and interrogators (CACI) to the U.S. military in Iraq. Plaintiffs apparently concede that they cannot sue the U.S. Government because of sovereign immunity.

Plaintiffs' allegations are broad and serious. They assert that defendants and/or their agents tortured one or more of them by: beating them; depriving them of food and water; subjecting them to long periods of excessive noise; forcing them to be naked for prolonged periods; holding a pistol (which turned out to be unloaded) to the head of one of them and pulling the trigger; threatening to attack them with dogs; exposing them to cold for prolonged periods; urinating on them; depriving them of sleep; making them listen to loud music; photographing them while naked; forcing them to witness the abuse of other prisoners, including rape, sexual abuse, beatings and attacks by dogs; gouging out an eye; breaking a leg; electrocuting one of them; spearing one of them; forcing one of them to wear women's underwear over his head; having women soldiers order one of them to take off his clothes and then beating him when he refused to do so; forbidding one of them to pray, withholding food during Ramadan; and otherwise ridiculing and mistreating him for his religious beliefs; and falsely telling one of them that his family members had been killed.

Plaintiffs assert claims under the Alien Tort Statute, RICO, government contracting laws, and the common law of assault and battery, wrongful death, false imprisonment, intentional infliction of emotional distress, conversion, and negligence. The motion to dismiss generally asserts lack of jurisdiction and failure to state a claim upon which relief can be granted. Of particular interest are defendants'

submissions that plaintiffs' claims present non-justiciable political questions, that "the law of nations" under the Alien Tort Statute does not cover torture by non-state actors, and that plaintiffs' common law tort claims are preempted by the government contractor defense.

Analysis

Legal standard

A motion to dismiss for failure to state a claim under Rule 12(b)(6) will be granted only if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). The complaint will be construed in the light most favorable to the plaintiff, and the plaintiff will have "the benefit of all inferences that can be derived from the facts alleged." *Kowal v. MCI Communications Corp.,* 16 F.3d 1271, 1276 (D.C. Cir. 1994) (internal citations omitted). On the other hand, a court may accept "neither 'inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint,' nor 'legal conclusions cast in the form of factual allegations.'" *Browning v. Clinton,* 292 F.3d 235, 242 (D.C. Cir. 2002) (quoting *Kowal,* 16 F.3d at 1275).

A motion to dismiss for lack of jurisdiction under Rule 12(b)(1) is treated like a Rule 12(b)(6) motion. *E.g., Barr v. Clinton,* 370 F.3d 1196, 1199 (D.C. Cir. 2004). To survive a Rule 12(b)(1) motion, a plaintiff

has the burden of establishing that jurisdiction is proper. *E.g., Macharia v. United States,* 334 F.3d 61, 67-68 (D.C. Cir. 2003).

Alien Tort Statute Claim

Plaintiffs assert that defendants violated the "law of nations" as described in the Alien Tort Statute (ATS), 28 U.S.C. § 1350. The ATS provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." In *Sosa v. Alvarez-Machain,* 124 S. Ct. 2739 (2004), the Supreme Court settled an old question by announcing that the ATS confers jurisdiction but does not create a cause of action. The *Sosa* decision also made it clear that, in limited circumstances, aliens can look to the "law of nations" for a federal common law cause of action. *Id.*

The ATS was first enacted as part of the Judiciary Act of 1789. The only "violation[s] of the law of nations" known at that time were "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 2761. New claims may be recognized under common law principles, but they must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Id.* at 2761-62. The Court in *Sosa* discussed five factors counseling very great caution on this front: 1) common law

judges in the past were seen as "discovering" law, but they are now seen as making or creating law; 2) since *Erie v. Tompkins,* 304 U.S. 64 (1938), the role of federal common law has been dramatically reduced, and courts have generally looked for legislative guidance before taking innovative measures; 3) creating private rights of action is generally best left to the legislature; 4) decisions involving international law may have collateral consequences that impinge on the discretion of the legislative and executive branches in managing foreign affairs; and 5) there is no mandate from Congress encouraging judicial creativity in this area, and in fact there are legislative hints in the opposite direction. *See id.* at 2762-63.

Plaintiffs make reference to numerous treaties and other sources of international law that strongly condemn torture. Those authorities generally address official (state) torture, and the question is whether the law of nations applies to *private actors* like the defendants in the present case. The Supreme Court has not answered that question, *see id.* at 2766 n.20, but in the D.C. Circuit the answer is no. In *Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774 (D.C. Cir. 1984), *cert. denied,* 470 U.S. 1003 (1985), victims of a 1978 terrorist attack in Israel sued a number of parties, including several private organizations, for violations of the law of nations under the ATS. A three-judge panel unanimously dismissed the case

with three separate opinions. Judge Edwards gave the ATS the broadest reach,[1] generally agreeing with the Second Circuit's landmark decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980), that acts of *official* torture violate the law of nations. *See Tel-Oren*, 726 F.2d at 786-87, 791. However, Judge Edwards found no consensus that private actors are bound by the law of nations. *Id.* at 791-95.[2] The Court of Appeals addressed the issue again only a year later in *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), a case involving allegations of "execution, murder, abduction, torture, rape, [and] wounding" by the Nicaraguan Contras, *id.* at 205, stating quite clearly that the law of nations "does not reach private, non-state conduct of this sort for the reasons stated by Judge Edwards in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 791-96 (Edwards, J. concurring); *see also id.* at 807 (Bork, J. concurring)." *Id.* at 206-207.[3]

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[1] Judge Bork essentially found that the ATS did not provide a private right of action on its own, that the common law allowed for at most the three types of law of nations claims recognized in 1789, and that virtually no international human rights law provided a private cause of action in municipal courts. *Tel-Oren*, 726 F.2d at 799-823. Judge Robb found the entire matter non-justiciable under the political question doctrine. *Id.* at 823-27.

[2] Judge Edwards considered the historic claim of piracy to be one of a limited number of exceptions to this principle, but he would not add torture. *Tel-Oren*, 726 F.2d at 794-95.

[3] In *Tel-Oren*, Judge Edwards noted that torture by private parties acting under "color of law," as compared to torture by

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Plaintiffs' allegations describe conduct that is abhorrent to civilized people, and surely actionable under a number of common law theories. After *Tel-Oren* or *Sanchez-Espinoza,* however, it is not actionable under the Alien Tort Statute's grant of jurisdiction, as a violation of the law of nations.

Political Question Doctrine

Defendants' assertion that plaintiffs' claims are non-justiciable because they implicate political questions is rejected. "The nonjusticiability of a political question is primarily a function of the separation of powers." *Baker v. Carr,* 369 U.S. 186, 210 (1962). The political question doctrine may lack clarity, *see, e.g., Comm. of United States Citizens Living in Nicaragua v. Reagan,* 859 F.2d 929, 933 (D.C. Cir. 1988), but it is

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private parties "acting separate from any states authority or direction," would be actionable under the ATS. 726 F.2d at 793. For rather obvious reasons, however, these plaintiffs disavow any assertion that the defendants were state actors, Pls.' Opp'n to Def. CACI Mot. Dismiss at 15-16: if defendants were acting as agents of the state, they would have sovereign immunity under *Sanchez-Espinoza.* As then-Judge Scalia noted in dicta, plaintiffs cannot allege that conduct is state action for jurisdictional purposes but private action for sovereign immunity purposes. *See Sanchez-Espinoza,* 770 F.2d at 207. Plaintiff Hadod asserted that defendants were acting "under the color of state authority," Pl. Hadod's Proposed Supplemental Mem. L. at 7-8, but subsequently withdrew his filing. This withdrawal eliminates the need to determine whether there is any tension between the state actor inquiry under the ATS and a similar inquiry under preemption involving an affirmative government contractor defense but not immunity. *See infra.*

not without standards. At least one of following must be "inextricable from the case at bar" to implicate the doctrine:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217; *see also Vieth v. Jubelirer*, 541 U.S. 267, 277-78 (2004) (citing the six *Baker* tests and noting that "these tests are probably listed in descending order of both importance and certainty"). Each case requires "a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action." *Baker*, 369 U.S. at 211-12.

The Constitution's allocation of war powers to the President and Congress does not exclude the courts

from every dispute that can arguably be connected to "combat," as the Supreme Court's rejection of the government's separation of powers argument in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2645-51 (2004), makes clear. As the Ninth Circuit observed, in an action by heirs of passengers of an Iranian civilian aircraft shot down by the U.S. military during the Iran-Iraq war, "the fact that an action is 'taken in the ordinary exercise of discretion in the conduct of war' does not put it beyond the judicial power." *Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992) (quoting and citing *The Paquete Habana*, 175 U.S. 677 (1900), and citing other cases), *cert. denied*, 508 U.S. 960 (1993). An action for damages arising from the acts of private contractors and not seeking injunctive relief does not involve the courts in "overseeing the conduct of foreign policy or the use and disposition of military power." *Luftig v. McNamara*, 373 F.2d 664, 666 (D.C. Cir. 1967).

Of course this case has some relationship to foreign relations, but "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker*, 369 U.S. at 211; *see also Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230-31 (1986) (allowing lawsuit to force Secretary of Commerce to declare Japan in violation of international whaling agreement); *Comm. of United States Citizens Living in Nicaragua*, 859 F.2d 929 (D.C. Cir. 1988) (finding "troubling" the district court refusal to adjudicate claim of infringement of personal and property rights of U.S. citizens

resulting from U.S. funding of Nicaraguan Contras). Nor does defendants' effort to frame this case as a standard matter of "war reparations" successfully invoke the political question doctrine. Here, unlike in many other reparations cases entangled with political questions, there is no state-negotiated reparations agreement competing for legitimacy with this court's rulings. *See, e.g., Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003) (California law on Holocaust era claims conflicting with executive agreements between U.S. and France, Austria, and Germany); *Hwang Geum Joo v. Japan*, ___ F.3d ___, 2005 WL 1513014 (D.C. Cir. 2005) (former World War II "comfort women" suing Japan despite prior diplomatic settlement of claims against Japan). The facts of this case are quite distinct from those found to implicate the political question doctrine in *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005). There, in a matter intertwined with Cold War decision-making, a former National Security Advisor and the United States itself were sued for the alleged murder and torture of a Chilean general in 1970. *See id.* The Court of Appeals found that the case challenged foreign policy decisions over which the courts have no authority. *Id.* Here plaintiffs sue private parties for actions of a type that both violate clear United States policy, *see* First Am. Compl. at ¶¶ 24-28, and have led to recent high profile court martial proceedings against United States soldiers.

Manageability problems may well emerge as the litigation in this case proceeds, especially if discovery

collides with government claims to state secrecy. The government is not a party, however, and I am not prepared to dismiss otherwise valid claims at this early stage in anticipation of obstacles that may or may not arise.

Preemption

Defendants assert that plaintiffs' common law claims are preempted under an extension of the government contractor defense laid out in *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988), and expanded by *Kooki*. Preemption in this sense means that, even if plaintiffs' serious common law allegations are true, there may be no remedy for them,[4] and

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[4] Defendants point to three alternative methods by which plaintiffs might seek redress (although not from defendants themselves): the Military Claims Act (providing compensation for claims against the military), 10 U.S.C. § 2733; the Foreign Claims Act (same – but specifically for damage in foreign countries), 10 U.S.C. § 2734; and a very general pledge by the Secretary of Defense to compensate detainees mistreated at Abu Ghraib. Def. Titan Mot. Dismiss at 22-23. The first two on their face are limited to "noncombat activities," which would make them inapplicable here if, as defendants argue elsewhere, the activities in question here were "combat activities." At oral argument, plaintiffs insisted that this court is the only forum in which compensation is available to them. 4/21/05 Tr. at 41. Although the State Department has also stated that relief may be available as defendants describe, *see* U.S. Department of State, Second Periodic Report of the United States of America to the Committee Against Torture, Annex 1-Part Two (May 6, 2005), http://www.state.gov/g/drl/rls/45738.htm#part_two, the record does not establish that any of these routes is actually

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plaintiffs' common law claims may indeed ultimately be barred. The government contractor defense is an affirmative defense, however, and defendants have not produced sufficient factual support to justify its application.

In *Boyle*, the estate of a Marine helicopter pilot sued a helicopter manufacturer for wrongful death caused by alleged product defects. *Boyle*, 487 U.S. at 502-03. The Supreme Court found Boyle's claims preempted as a matter of judge-made federal common law. *Id.* at 504-13. The Court first determined that "uniquely federal interests" were at stake – the rights and obligations of the United States under its contracts, civil liability for actions taken by federal officials in the course of their duty, and federal procurement of equipment. *Id.* at 504-07. Then, the Court concluded that the application of state law liability theory presented a "significant conflict" with federal policies or interests, *id.* at 507-513, finding guidance in the "discretionary function" exception to the Federal Tort Claims Act (FTCA). *Id.* at 511-13. The Court reasoned that if the helicopter's design was a result of government policy decisions, even ones that made trade-offs between safety and combat effectiveness, liability should not be permitted. *Id.* To ensure that the design was a product of government discretionary decision-making, the Court remanded

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viable, and my working assumption is that it is either this court or nothing for plaintiffs.

for a determination as to whether: "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Id.* at 512.

Koohi extended *Boyle* to a case involving combatant activities. The FTCA bars suits against the federal government for "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j). In *Koohi*, the court looked to this combatant activities exception to the FTCA and found that one purpose of the exception "is to recognize that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action." *Koohi*, 976 F.2d at 1337. Thus, guided by *Boyle's* reliance on the FTCA, the court found that imposing liability on the civilian makers of a weapons system used in an accidental shooting down of a civilian aircraft "would create a duty of care where the combatant activities exception is intended to ensure that none exists." *Id.*; *see also Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486 (C.D. Cal. 1993).

Defendants want me to expand *Boyle's* preemption analysis beyond *Koohi's* negligence/product liability context to automatically preempt any claims, including these intentional tort claims, against contractors performing work they consider to be

combatant activities. This would be the first time that *Boyle* has ever been applied in this manner. *Boyle* explicitly declined to address the question of extending federal immunity to non-government employees, *Boyle*, 487 U.S. at 505 n.1, and I will not extend that immunity here.[5] Rather, preemption under the government contractor defense is an affirmative defense, with the burden of proof on the defendants. *See id.* at 513-14; *Densberger v. United Techs. Corp.*, 297 F.3d 66, 75 (2nd Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Snell v. Bell Helicopter Textron, Inc.*, 107 F.3d 744, 746 (9th Cir. 1997).

Under the first step of *Boyle's* analysis, I must agree that the treatment of prisoners during wartime implicates "uniquely federal interests." For the second step, following *Boyle* and *Koohi*, I will look to the FTCA for guidance on the question of whether a suit here would produce a "significant conflict" with federal policies or interests. In *Boyle*, the Court sought to develop a common law rule that would prevent "state tort suits against contractors [that] would produce the same effect sought to be avoided by the FTCA exemption." 487 U.S. at 511. Especially because the government will eventually end up paying for increased liability through higher contracting

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[5] Immunity involves not an affirmative defense that may ultimately be put to the jury, but a decision by the court at an early stage that the defendant is entitled to freedom from suit in the first place. *See Mitchell v. Forsyth*, 472 U.S. 511, 523-27 (1985).

prices (or through an inability to find contractors willing to take on certain tasks), the *Boyle* court noted, "It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production." *Id.* at 512. The inquiry then turns to whether allowing a suit to go forward would conflict with the purposes of the FTCA and whether defendants have shown that they were essentially soldiers in all but name.

The legislative history for the FTCA's combatant activities exception[6] is "singularly barren," *Johnson v.*

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[6] Three other exceptions to the FTCA might theoretically apply here. Defendants argue that the discretionary function exception, 28 U.S.C. § 2680(a), should apply. However, as discussed *supra*, *Boyle* established a clear three-part test, which defendants do not meet. The rationale behind the foreign country exception, 28 U.S.C. § 2680(k), appears to be Congressional "unwilling[ness] to subject the United States to liabilities depending upon the laws of a foreign power." *United States v. Spelar*, 338 U.S. 217, 221 (1949); *Smith v. United States*, 507 U.S. 197, 210 (1993). This concern has not been substantially discussed by either party, presents a number of very complex issues, and is not appropriately addressed without further briefing. The exception for "assault, battery, false imprisonment, false arrest," 28 U.S.C. § 2680(h), and several other inapplicable intentional torts might also apply here. However, the legislative history for this exception has in the past been called "sparse," *United States v. Shearer*, 473 U.S. 52, 55 (1985), and "meagre," *Panella v. United States*, 216 F.2d 622, 625 (2nd Cir. 1954) (Harlan, J.), the case law in this area is equally lacking, and neither party has mentioned this exception in briefs.

United States, 170 F.2d 767, 769 (9th Cir. 1948), and there is little case law for guidance. The exception seems to represent Congressional acknowledgment that war is an inherently ugly business for which tort claims are simply inappropriate. As the Supreme Court has explained in a different context, "It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." *Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950). State law regulation of combat activity would present a "significant conflict" with this federal interest in unfettered military action. This is true even with regard to intentional torts, because exceptions to FTCA represent "Governmental activities which by their very nature should be free from the hindrance of a possible damage suit." *Johnson v. United States*, 170 F.2d at 769; *see also Koohi*, 976 F.2d at 1335 (FTCA combatant activities exception applies even to acts that are "deliberate rather than the result of error"). Thus, we are brought again the question of whether defendants' employees were essentially acting as soldiers.

Defendants were employed by the U.S. military as interrogators (CACI) and interpreters (Titan) in a prison in Iraq where captured persons were detained. Defendants assert that their employees were essentially on "loan" to the military, 4/21/05 Tr. at 6, that these employees were "essentially . . . integrated into

the military hierarchy," *id.* at 29 and that the "military's operational control over [these employees was] total." Def. Titan Mot. Dismiss at 6. A "Statement of Work" provided by Titan is consistent with the notion that Titan's employees were soldiers in all but name, although it also contains some language suggesting a contrary conclusion.[7] (CACI has not provided a statement of work.) Other than Titan's Statement of Work, defendants' have produced nothing beyond limited assertions to meet their factual burden of showing that they are entitled to the government contractor defense. More information is needed on what exactly defendants' employees were doing in Iraq. What were their contractual responsibilities? To whom did they report? How were they supervised? What were the structures of command and control? If they were indeed soldiers in all but name, the government contractor defense will succeed, but the burden is on defendants to show that they are entitled to preemption.

Full discovery is not appropriate at this stage, especially given the potential for time-consuming disputes involving state secrets. Since limited additional facts are needed, a motion for summary

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[7] For example, while contractors "must adhere to the standards of conduct established by the operational or unit commander," Titan Statement of Work at § C-1.8.4, they also "shall not wear any identification badge or tags that identifies them as an employee of the United States Government." *Id.* at § C-1.9.2.

judgment is the right vehicle to address the issue of preemption. I will entertain such a motion from defendants, complete with whatever supporting material they believe sufficient. If appropriate, plaintiffs will then of course be entitled to file a Rule 56(f) affidavit, and we will address any discovery at that point.[8]

RICO Claim

Plaintiffs' claims under RICO could be dismissed for a number of reasons, but it is sufficient to note here that plaintiffs do not have standing. A plaintiff seeking RICO standing must allege damage to "business or property." 18 U.S.C. § 1964(c). Allegations of personal injuries alone are not sufficient. *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 100-02 (D.D.C. 2003). Plaintiffs allege that *U.S. Military forces* seized $400 and a weapon from plaintiff Hadod, First Am. Compl. at ¶ 40, but plaintiffs' counsel concede that they can allege no acts involving defendants that go beyond personal injury. Pls.' Opp'n to Def. Titan's Mot. Dismiss at 27-28.

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[8] I note that *Al Rawi v. Titan Corporation* (05-cv-1165) has just been transferred to this Court and deals with substantially the same issues as the present case. I will be setting a status conference for all parties in both that case and this case, at which time I will set a briefing schedule for motions in both cases.

Government Contracting Law Claim

Plaintiffs' claims under various laws regulating U.S. government contracts must be dismissed. First, plaintiffs do not attempt to challenge defendants' assertion that these laws provide no private right of action. Second, insofar as plaintiffs attempt in their opposition to somehow restyle this portion of their complaint as presenting a "claim for equitable relief" through RICO, *see, e.g.,* Pls.' Opp'n to Def. Titan's Mot. Dismiss at 31-33, I need only note that I am dismissing plaintiffs' RICO claims. Finally, plaintiffs have failed to join an indispensable party (the United States) in this claim. *See* Fed. R. Civ. P. 12(b)(7), 19.

False Imprisonment and Conversion Claims

Although most of plaintiffs' common law claims may proceed as provided above, the false imprisonment and conversion claims will be dismissed. As discussed above, the only factual allegation that could conceivably support conversion involves the U.S. military and not defendants. As to false imprisonment, plaintiffs' initially assert in their complaint that they were "forcibly detained under United States custody in Iraq," First Am. Compl. at ¶ 1, and that they were "detained, interrogated, and physically abused by the Defendants and/or others while under the custody and control of the Defendants," *e.g., id.* at ¶ 32. Those plaintiffs providing information on their arrests, however, all indicate that they were arrested by U.S. or Iraqi authorities, not defendants. *See* First Am. Compl. at ¶ 31, 36, 40, 49, 54. Plaintiffs have not

responded to CACI's observation that the complaint appears to implicate only the United States, and not defendants, in their detention, Def. CACI Mot. Dismiss at 44-45, except to say that they "intend to amend the Amended Complaint when additional facts are discovered with regard to their claim[ ] for . . . false imprisonment." Pls.' Opp'n to Def. CACI's Mot. Dismiss at 32 n.10. If, and when, plaintiffs have a justifiable basis on which to implicate these defendants in their false imprisonment and conversion claims, they may seek leave to amend their complaint.

Diversity and Minimum Amount

Jurisdiction for plaintiffs' common law claims is based on 28 U.S.C. § 1332. That statute does not confer jurisdiction over suits by a group consisting of only foreign persons against another foreign person. 28 U.S.C. § 1332(a). As plaintiffs are aliens, their claims against defendant CACI N.V., which is incorporated in the Netherlands, must be dismissed. *See JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 91 (2002) (entities incorporated in foreign countries are foreign citizens for purposes of diversity analysis).[9] As to plaintiffs'

[9] At oral argument, counsel for CACI stated that CACI N.V. was not involved in the interrogator contracts in question here. 4/21/05 Tr. at 26. Further, counsel indicated that a CACI company not named in the suit provided interrogators to the military. *Id.*

failure to allege at least $75,000 in damages, 28 U.S.C. § 1332(a), I find that it is in the interest of justice to allow an amendment.

* * *

An appropriate order accompanies this memorandum.

JAMES ROBERTSON
United States District Judge

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-7001 **September Term 2009**

1:05-cv-01165-JR

Filed On: January 25, 2010

Saleh, An individual, et al.,

Appellees

v.

CACI International Inc.,
a Delaware Corporation and
CACI Premier Technology, Inc.,
a Delaware Corporation,

Appellants

Consolidated with 08-7030, 08-7044, 08-7045

No. 08-7008

Saleh, An Individual, et al.,

Appellants

v.

Titan Corporation,

Appellee

CACI International Inc. and
CACI Premier Technology, Inc.,

Intervenors

Consolidated with 08-7009

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

ORDER

The petition for rehearing en banc filed in Nos. 08-7001, et al., and Nos. 08-7008, et al., and the responses thereto were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Scott H. Atchue
Deputy Clerk

28 U.S.C. § 1346. United States as defendant

* * *

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * *

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28 U.S.C. § 2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

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28 U.S.C. § 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to –

> **(a)** Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
>
> . . . .
>
> **(j)** Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

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28 U.S.C. § 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government –

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which

such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the

incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and

division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if –

> (A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and
>
> (B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

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28 U.S.C. § 1350. Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

18 U.S.C. § 2441. War crimes

(a) Offense. – Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) Circumstances. – The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

(c) Definition. – As used in this section the term "war crime" means any conduct –

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;

(2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;

(3) which constitutes a grave breach of common Article 3 (as defined in subsection (d)) when committed in the context of and in association with an armed conflict not of an international character; or

(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

(d) Common Article 3 violations. –

(1) Prohibited conduct. – In subsection (c)(3), the term "grave breach of common Article 3" means any conduct (such conduct constituting a grave breach of common Article 3 of the international conventions done at Geneva August 12, 1949), as follows:

(A) Torture. – The act of a person who commits, or conspires or attempts to commit, an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind.

(B) Cruel or inhuman treatment. – The act of a person who commits, or conspires or attempts to commit, an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another within his custody or control.

(C) Performing biological experiments. – The act of a person who subjects, or conspires or attempts to subject, one or more persons within his custody or physical control to biological experiments without a legitimate medical or dental purpose and in so doing endangers the body or health of such person or persons.

(D) Murder. – The act of a person who intentionally kills, or conspires or attempts to kill, or kills whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause.

(E) Mutilation or maiming. – The act of a person who intentionally injures, or conspires or attempts to injure, or injures whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause, by disfiguring the person or persons by any mutilation thereof or by permanently disabling any member, limb, or organ of his body, without any legitimate medical or dental purpose.

(F) Intentionally causing serious bodily injury. – The act of a person who

intentionally causes, or conspires or attempts to cause, serious bodily injury to one or more persons, including lawful combatants, in violation of the law of war.

(G) Rape. – The act of a person who forcibly or with coercion or threat of force wrongfully invades, or conspires or attempts to invade, the body of a person by penetrating, however slightly, the anal or genital opening of the victim with any part of the body of the accused, or with any foreign object.

(H) Sexual assault or abuse. – The act of a person who forcibly or with coercion or threat of force engages, or conspires or attempts to engage, in sexual contact with one or more persons, or causes, or conspires or attempts to cause, one or more persons to engage in sexual contact.

(I) Taking hostages. – The act of a person who, having knowingly seized or detained one or more persons, threatens to kill, injure, or continue to detain such person or persons with the intent of compelling any nation, person other than the hostage, or group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of such person or persons.

(2) Definitions. – In the case of an offense under subsection (a) by reason of subsection (c)(3) –

(A) the term "severe mental pain or suffering" shall be applied for purposes of

paragraphs (1)(A) and (1)(B) in accordance with the meaning given that term in section 2340(2) of this title;

(B) the term "serious bodily injury" shall be applied for purposes of paragraph (1)(F) in accordance with the meaning given that term in section 113(b)(2) of this title;

(C) the term "sexual contact" shall be applied for purposes of paragraph (1)(G) in accordance with the meaning given that term in section 2246(3) of this title;

(D) the term "serious physical pain or suffering" shall be applied for purposes of paragraph (1)(B) as meaning bodily injury that involves –

(i) a substantial risk of death;

(ii) extreme physical pain;

(iii) a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or

(iv) significant loss or impairment of the function of a bodily member, organ, or mental faculty; and

(E) the term "serious mental pain or suffering" shall be applied for purposes of paragraph (1)(b) in accordance with the meaning given the term "severe mental pain or suffering" (as defined in section 2340(2) of this title), except that –

(i) the term "serious" shall replace the term "severe" where it appears; and

(ii) as to conduct occurring after the date of the enactment of the Military Commissions Act of 2006, the term "serious and non-transitory mental harm (which need not be prolonged)" shall replace the term "prolonged mental harm" where it appears.

(3) Inapplicability of certain provisions with respect to collateral damage or incident of lawful attack. – The intent specified for the conduct stated in subparagraphs (D), (E), and (F) or paragraph (1) precludes the applicability of those subparagraphs to an offense under subsection (a) by reasons of subsection (c)(3) with respect to –

(A) collateral damage; or

(B) death, damage, or injury incident to a lawful attack.

(4) Inapplicability of taking hostages to prisoner exchange. – Paragraph (1)(I) does not apply to an offense under subsection (a) by reason of subsection (c)(3) in the case of a prisoner exchange during wartime.

(5) Definition of grave breaches. – The definitions in this subsection are intended only to define the grave breaches of common Article 3 and not the full scope of United States obligations under that Article.

T.I.A.S. No. 3365, 6 U.S.T. 3516, 1956 WL 54810
(U.S. Treaty)

UNITED STATES OF AMERICA
Multilateral

Protection of War Victims

Civilian Persons

Convention, with annexes,
dated at Geneva August 12, 1949.

Ratification advised by the Senate of the
United States of America, subject to a reservation
and statement, July 6, 1955;

Ratified by the President of the United States
of America, subject to said reservation and
statement, July 14, 1955;

Ratification of the United States of America deposited
with the Swiss Federal Council August 2, 1955;

Proclaimed by the President of the United States
of America August 30, 1955;

Date of entry into force with respect to the
United States of America: February 2, 1956.

February 2, 1956.

* * *

ARTICLE 3

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

* * *

ARTICLE 27

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

* * *

ARTICLE 31

No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.

ARTICLE 32

The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.

ARTICLE 37

Protected persons who are confined pending proceedings or serving a sentence involving loss of liberty, shall during their confinement be humanely treated. . . .

Protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein. They shall, if possible, be separated from other detainees and shall enjoy conditions of food and hygiene which will be sufficient to keep them in good health, and which will

be at least equal to those obtaining in prisons in the occupied country.

They shall receive the medical attention required by their state of health.

They shall also have the right to receive any spiritual assistance which they may require.

Women shall be confined in separate quarters and shall be under the direct supervision of women.

Proper regard shall be paid to the special treatment due to minors.

Protected persons who are detained shall have the right to be visited by delegates of the Protecting Power and of the International Committee of the Red Cross, in accordance with the provisions of Article 143.

Such persons shall have the right to receive at least one relief parcel monthly.

* * *

ARTICLE 83

The Detaining Power shall not set up places of internment in areas particularly exposed to the dangers of war.

* * *

ARTICLE 100

The disciplinary regime in places of internment shall be consistent with humanitarian principles, and shall in no circumstances include regulations imposing on

internees any physical exertion dangerous to their health or involving physical or moral victimization. Identification by tattooing or imprinting signs or markings on the body, is prohibited.

In particular, prolonged standing and roll-calls, punishment drill, military drill and manoeuvres, or the reduction of food rations, are prohibited.

* * *

ARTICLE 147

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

U.S. Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (Oct. 1, 1997), § 1-5(a)-(c)

1-5. General protection policy

a. U.S. policy, relative to the treatment of EPW, CI and RP in the custody of the U.S. Armed Forces, is as follows:

(1) All persons captured, detained, interned, or otherwise held in U.S. Armed Forces custody during the course of conflict will be given humanitarian care and treatment from the moment they fall into the hands of U.S. forces until final release or repatriation.

(2) All persons taken into custody by U.S. forces will be provided with the protections of the GPW until some other legal status is determined by competent authority.

(3) The punishment of EPW, CI and RP known to have, or suspected of having, committed serious offenses will be administered IAW due process of law and under legally constituted authority per the GPW, GC, the Uniform Code of Military Justice and the Manual for Courts Martial.

(4) The inhumane treatment of EPW, CI, RP is prohibited and is not justified by the stress of combat or with deep provocation. Inhumane treatment is a serious and punishable violation under international law and the Uniform Code of Military Justice (UCMJ).

b. All prisoners will receive humane treatment without regard to race, nationality, religion, political opinion, sex, or other criteria. The following acts are prohibited: murder, torture, corporal punishment, mutilation, the taking of hostages, sensory deprivation, collective punishments, execution without trial by proper authority, and all cruel and degrading treatment.

c. All persons will be respected as human beings. They will be protected against all acts of violence to include rape, forced prostitution, assault and theft, insults, public curiosity, bodily injury, and reprisals of any kind. They will not be subjected to medical or scientific experiments. This list is not exclusive. EPW/RP are to be protected from all threats or acts of violence

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U.S. Army Regulation 715-9, Contractors Accompanying the Force, §§ 3-2(c), 3-2(f), 3-3(b) (Oct. 29, 1999).

§ 3-2(c)

Commercial firm(s) providing battlefield support services will supervise and manage functions of their employees, as well as maintain on-site liaison with functional U.S. organizations.

* * *

§ 3-2(f)

The commercial firm(s) providing the battlefield support services will perform the necessary supervisory and management functions of their employees. Contractor employees are not under the direct supervision of military personnel in the chain of command. The contracting officer (KO), or their designated liaison (contracting officer's representative (COR), is responsible for monitoring and implementing contractor performance requirements; however, contractor employees will be expected to adhere to all guidance and obey all instructions and general orders issued by the Theater Commander. In the event instructions or orders of the Theater Commander are violated, the Theater Commander may limit access to facilities and/or revoke any special status a contractor employee has as an individual accompanying the force to include directing the Contracting Officer to demand that the contractor replace the individual.

* * *

§ 3-3(b)

Contracted support service personnel shall not be supervised or directed by military or Department of the Army (DA) civilian personnel. Instead, as prescribed by the applicable federal acquisition regulations, or as required by force protection to insure the health and welfare, the Contracting Officer's Representative shall communicate the Army's requirements and prioritize the contractor's activities within the terms and conditions of the contract.

U.S. Army Field Manual 3-100.21, Contractors on the Battlefield (Jan. 2003)[1]

§ 1-22

Management of contractor activities is accomplished through the responsible contracting organization, not the chain of command. Commanders do not have direct control over contractors or their employees (contractor employees are not the same as government employees); only contractors manage, supervise, and give directions to their employees. Commanders must manage contractors through the contracting officer or ACO. CORs may be appointed by a contracting officer to ensure a contractor performs in accordance with (IAW) the terms and conditions of the contract and the Federal acquisition regulations. The COR serves as a form of liaison between the contractor, the supported unit, and the contracting officer.

* * *

§ 1-25

It is important to understand that the terms and conditions of the contract establish the relationship between the military (US Government) and the contractor; this relationship does not extend through the contractor supervisor to his employees. Only the contractor can directly supervise its employees. The military chain of command exercises management control through the contract.

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[1] See RS.112, Appendix C-4 for the full text of Field Manual 3-100.21.

* * *

§ 4-2

As stated earlier, contractor management does not flow through the standard Army chain of command. Management of contractor activities is accomplished through the responsible requiring unit or activity COR through the supporting contracting organization in coordination with selected ARFOR commands and staffs. It must be clearly understood that commanders do not have direct control over contractor employees (**contractor employees are not government employees**); only contractors directly manage and supervise their employees. Commanders manage contractors through the contracting officer and their appointed CORs in accordance with the terms and conditions of the contract.

* * *

§ 4-45

Contractor employees are not subject to military law under the UCMJ when accompanying US forces, except during a declared war. Maintaining discipline of contractor employees is the responsibility of the contractor's management structure, not the military chain of command. The contractor, through company policies, has the most immediate influence in dealing with infractions involving its employees. It is the contractor who must take direct responsibility and action for his employee's conduct.

48 C.F.R. 252.225-7040 Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States.

As prescribed in 225.7402-5(a), use the following clause:

CONTRACTOR PERSONNEL AUTHORIZED TO ACCOMPANY U.S. ARMED FORCES DEPLOYED OUTSIDE THE UNITED STATES (JUL 2009)

(a) Definitions. As used in this clause –

* * *

Law of war means that part of international law that regulates the conduct of armed hostilities. The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.

* * *

(b) General.

(1) This clause applies when Contractor personnel are authorized to accompany U.S. Armed Forces deployed outside the United States in –

(i) Contingency operations;

(ii) Humanitarian or peacekeeping operations; or

(iii) Other military operations or military exercises, when designated by the Combatant Commander.

(2) Contract performance in support of U.S. Armed Forces deployed outside the United States may require work in dangerous or austere conditions. Except as otherwise provided in the contract, the Contractor accepts the risks associated with required contract performance in such operations.

(3) Contractor personnel are civilians accompanying the U.S. Armed Forces.

(iv) Unless immune from host nation jurisdiction by virtue of an international agreement or international law, inappropriate use of force by contractor personnel authorized to accompany the U.S. Armed Forces can subject such personnel to United States or host nation prosecution and civil liability (see paragraphs (d) and (j)(3) of this clause).

(d) Compliance with laws and regulations. (1) The Contractor shall comply with, and shall ensure that its personnel authorized to accompany U.S. Armed Forces deployed outside the United States as specified in paragraph (b)(1) of this clause are familiar with and comply with, all applicable –

(i) United States, host country, and third country national laws;

(ii) Provisions of the law of war, as well as any other applicable treaties and international agreements;

(iii) United States regulations, directives, instructions, policies, and procedures; and

(iv) Orders, directives, and instructions issued by the Combatant Commander, including those relating to force protection, security, health, safety, or relations and interaction with local nationals.

(2) The Contractor shall institute and implement an effective program to prevent violations of the law of war by its employees and subcontractors, including law of war training in accordance with paragraph (e)(1)(vii) of this clause.

* * *

(h) Contractor personnel. (1) The Contracting Officer may direct the Contractor, at its own expense, to remove and replace any Contractor personnel who jeopardize or interfere with mission accomplishment or who fail to comply with or violate applicable requirements of this contract. Such action may be taken at the Government's discretion without prejudice to its rights under any other provision of this contract, including the Termination for Default clause.

* * *

(3) Contractor personnel shall report to the Combatant Commander or a designee, or through other channels such as the military police, a judge advocate, or an inspector general, any suspected or alleged conduct for which there is credible information that such conduct –

(i) Constitutes violation of the law of war; or

(ii) Occurred during any other military operations and would constitute a violation of the law of war if it occurred during an armed conflict.

73 FR 16764-01, 2008 WL 828273 (F.R.)

RULES and REGULATIONS

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 225, and 252

RIN 0750-AF25

Defense Federal Acquisition Regulation Supplement; Contractor Personnel Authorized To Accompany U.S. Armed Forces (DFARS Case 2005-D013)

Monday, March 31, 2008

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD has adopted as final, with changes, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement DoD policy regarding contractor personnel authorized to accompany U.S. Armed Forces deployed outside the United States.

DATES: Effective Date: March 31, 2008.

* * *

6. Risk/Liability to Third Parties/Indemnification (252.225-7040(b)(2))

Comment: Many respondents expressed concern that the DFARS rule shifts to contractors all risks associated with performing the contract, and may lead

courts to deny contractors certain defenses in tort litigation. The respondents cited decisions by State and Federal courts arising out of injuries or deaths to third parties, including military members and civilians. Generally, the courts absolved contractors of liability to third parties where the Government carried ultimate responsibility for the operation. For example –

• In *Smith v. Halliburton Co.*, No. H-06-0462, 2006 WL 1342823 (S.D. Tex. May 16, 2006) and *Whitaker v. Kellogg Brown & Root, Inc.*, No. 05-CV-78, 2006 WL 1876922 (M.D. Ga. July 6, 2006), the courts found there was no risk and no liability associated with contractor performance when active duty military members were injured in situations where the military (or the injured member himself) was responsible for force protection of military members.

• In *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992), the contractor bore no risk and no liability for military decisions aboard the U.S.S. Vincennes to shoot down an approaching aircraft during a time of war, and the contractor had no responsibility to design or manufacture the Aegis weapon system to prevent such use by military members.

Some respondents expressed concern that the acceptance of risk may preclude grants of indemnification. One respondent stated that the rule could adversely affect indemnification that would otherwise be available. The clause at FAR 52.228-7, Insurance-Liability to Third

Persons, provides limited indemnification, but provides that contractors shall not be reimbursed for liabilities for which the contractor is otherwise responsible under the express terms of any clause specified in the Schedule or elsewhere in the contract. The respondent also stated that the provisions requiring the contractor to accept certain risks and liabilities could also be the basis to deny pre- or post-award requests for indemnification under Public Law 85-804.Another respondent cited a decision by a DoD Contract Appeals Board in which the Board declined a contractor's request for indemnification under Public Law 85-804 because, according to the Board, contractors should not be able to deliberately enter into contractual arrangements with full knowledge that a risk is involved and yet propose unrealistically low prices on the hopes they may later gain indemnification. The respondents recommended that the United States either identify, quantify, and accept all the risk or insert language that would immunize contractors from tort liability. Specifically, several respondents recommended adding the statement, "Notwithstanding any other clause in this contract, nothing in this clause should be interpreted to affect any defense or immunity that may be available to the contractor in connection with third-party claims, or to enlarge or diminish any indemnification a contractor may have under this contract or as may be available under the law." There was also concern that, by accepting all risks of performance, contractors would not be able to obtain workers compensation insurance or reimbursement under the Defense Base Act. One

respondent recommended that the contractor's share of risk in the rule be revised as follows: "Except as otherwise provided in the contract, the Contractor accepts the risks associated with required contract performance in such operations."

DoD Response: DoD believes that the rule adequately allocates risks, allows for equitable adjustments, and permits contractors to defend against potential third-party claims. Contractors are in the best position to plan and perform their duties in ways that avoid injuring third parties. Contractors are equally or more responsible to research host nation laws and proposed operating environments and to negotiate and price the terms of each contract effectively. Accordingly, the clause retains the current rule of law, holding contractors accountable for the negligent or willful actions of their employees, officers, and subcontractors. This is consistent with existing laws and rules, including the clause at FAR 52.228-7, Insurance-Liability to Third Persons, and FAR Part 50, Extraordinary Contractual Actions, as well as the court and board decisions cited in the comments. The current law regarding the Government Contractor Defense (e.g., the line of cases following *Boyle v. United Technologies*, 487 U.S. 500, 108 S. Ct. 2510 (1988)) extends to manufacturers immunity when the Government prepares or approves relatively precise design or production specifications after making sovereign decisions balancing known risks against Government budgets and other factors in control of the Government. This rule covers service contracts,

not manufacturing, and it makes no changes to existing rules regarding liability. The public policy rationale behind Boyle does not apply when a performance-based statement of work is used in a services contract, because the Government does not, in fact, exercise specific control over the actions and decisions of the contractor or its employees or subcontractors. Asking a contractor to ensure its employees comply with host nation law and other authorities does not amount to the precise control that would be requisite to shift away from a contractor's accountability for its own actions. Contractors will still be able to defend themselves when injuries to third parties are caused by the actions or decisions of the Government. However, to the extent that contractors are currently seeking to avoid accountability to third parties for their own actions by raising defenses based on the sovereignty of the United States, this rule should not send a signal that would invite courts to shift the risk of loss to innocent third parties. The language in the clause is intended to encourage contractors to properly assess the risks involved and take proper precautions. However, to preclude the misunderstanding that asking the contractor to "accept all risks" is an attempt to shift all risk of performance to the contractor without regard to specific provisions in the contract, the statement in the rule regarding risk has been amended to add the lead-in phrase, "Except as otherwise provided in the contract".

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(7)

No. 09-1313

JUN 28 2010

IN THE

Supreme Court of the United States

HAIDAR MUHSIN SALEH,
ILHAM NASSIR IBRAHIM, *et al.*,

Petitioners,

v.

CACI INTERNATIONAL INC, CACI PREMIER TECHNOLOGY, INC., and TITAN CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS CACI INTERNATIONAL INC AND CACI PREMIER TECHNOLOGY, INC.

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent CACI Premier Technology, Inc. is a wholly-owned subsidiary of CACI, Inc. – Federal, which in turn is a wholly-owned subsidiary of Respondent CACI International Inc.

Respondent CACI International Inc is a publicly-traded company and is CACI Premier Technology, Inc.'s ultimate parent company. No publicly-traded company has a 10% or greater ownership interest in CACI International Inc.

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STATEMENT OF THE CASE

CACI adopts the statement of the case set forth in Respondent Titan's brief in opposition to Petitioners' petition. In particular, CACI notes that the Court of Appeals lacked jurisdiction to review, and did not review, the district court's grant of CACI's motion to dismiss Petitioners' Alien Tort Statute ("ATS") claims. CACI was before the Court of Appeals on an interlocutory appeal concerning preemption and Petitioners did not cross-appeal the district court's grant of CACI's motion to dismiss the ATS claims. *See* Pet. App. 8.

REASONS FOR DENYING THE PETITION

I. Petitioners' ATS Claims Do Not Present The Claimed Circuit Split and Do Not Warrant Review

A. Petitioners' ATS Claims Do Not Present The Claimed Circuit Split

1. The D.C. Circuit's Ruling Did Not Turn on Titan's Status As a Public or Private Actor

Petitioners first argue the Court should use this case to resolve a claimed circuit split as to whether the ATS permits claims for torture or war crimes to be brought against private actors. Pet. 14-19. The D.C. Circuit's decision, however, did not rest on that basis, and therefore does not squarely present that question. Instead, the D.C. Circuit rejected Petitioners' claims at the threshold, finding that Petitioners' "stunningly broad" claims could not be squared with the judicial

restraint this Court required in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The D.C. Circuit's ruling did not depend on the Respondents' status as state or private actors. That ruling was a simple and straightforward application of the correctly-stated principles in *Sosa*, and does not implicate any circuit split.

In reviewing the facts and legal framework of *Sosa*, the D.C. Circuit observed that this Court had "noted, but declined to decide, the issue which divides us from the Second Circuit, whether a private actor, as opposed to a state, could be liable under the ATS." Pet. App. 31 (citing *Sosa*, 542 U.S. at 733 n.20). But the appellate court further observed that this Court's mention of the issue did not mean this Court had decided it: "courts often reserve an issue they don't have to decide because, even assuming *arguendo* they favor one side, that side loses on another ground." Pet. App. 31-32.

The same is true here—just as this Court did not decide the private actor issue in *Sosa*, the D.C. Circuit did not ground its decision on Titan's status as a private actor.[1] Instead, the appellate court rejected Petitioners' ATS claims because the breadth of those claims could not be squared with *Sosa*'s "imperative of judicial restraint." Pet. App. 32. The court noted *Sosa*'s command that federal courts considering new asserted tort actions under the ATS "must be reluctant to look

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1. The D.C. Circuit did not have jurisdiction to consider Petitioners' ATS claims against CACI, because Petitioners had not cross-appealed the ATS issue with respect to CACI. Pet. App. 8.

to the common law, including international law, in derogation of the acknowledged role of legislatures in making policy." *Id.*

"Bearing that caution in mind, and in light of the holding of *Sosa*," the D.C. Circuit had "little difficulty in affirming the district judge's dismissal of" Petitioners' ATS claims against Titan. *Id. Sosa* permits recognition of a new claim under the law of nations only where there is a firm international consensus as specific and universal as that which existed in 1789 for the three limited causes of action contemplated at the time: piracy, infringement of ambassadorial rights, and violations of safe conduct. Pet. App. 30-31. In contrast to this very narrow opening, the D.C. Circuit observed that

> [Petitioners'] claim—as it appeared in their briefs and oral argument before us—is stunningly broad. They claim that any 'abuse' inflicted or supported by Titan's translator employees on plaintiff detainees is condemned by a settled international law. At oral argument, counsel claimed that included even assault and battery.

Pet. App. 32-33 (footnote omitted). At oral argument, Petitioners' counsel confirmed Petitioners' claims were not limited to what is "labeled definitionally as torture," but included all "physical force" because Petitioners claimed "assault and battery." Pet. App. 33 n.12. The D.C. Circuit rejected Petitioners' claim as "an untenable, even absurd, articulation of a supposed consensus of international law." Pet. App. 33.

The D.C. Circuit then went on to discuss a number of alternative reasons supporting its decision. One alternative reason (stated after an express "*arguendo*" assumption) was the D.C. Circuit's rule that "[a]lthough torture committed by a state is recognized as a violation of a settled international norm, that cannot be said of private actors." Pet. App. 34; *see* Subsection 2, *infra*.[2] The court further noted that Petitioners' allegation that Respondents acted "under the color of law" ran into the problems of federal preemption and sovereign immunity. Pet. App. 34-35 (citing Pet. App. 123-24 & n.3; *see also* Pet. App. 109-11). Importantly, this case and the D.C. Circuit precedent on which the appellate court relied concern allegations of conduct under color of *United States* law, and therefore raise sovereign immunity and preemption issues that are not present in the Second and Eleventh Circuit cases on which Petitioners rely, which all concerned conduct under color of *foreign* law. Based on this significant *factual* difference, there is not any conflict of law between the D.C. and Second Circuits on this point. *See Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 n.4 (D.C. Cir. 1985).

The Court of Appeals continued to discuss additional reasons for its ruling, including:

- this Court's "recognition of Congress' superior legitimacy in creating causes of action," Pet. App. 35 (citing *Sosa*, 542 U.S. at 725-28);

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2. The court did not address the Second Circuit's exception to this rule where torture is alleged within a claim for genocide or war crimes, finding Petitioners had "not brought to our attention any specific allegations of such behavior." Pet. App. 34 n.13.

- the absence of any legislatively-created cause of action in the Torture Victim Protection Act, the Military Commissions Act, the federal torture statute, the War Crimes Act, or the Uniform Code of Military Justice, *id.*;

- this Court's command of judicial restraint "where, as here, a court's reliance on supposed international law would impinge on the foreign policy prerogatives of our legislative and executive branches," Pet. App. 36; and

- a reference to the Court of Appeals' federal preemption analysis, based on congressionally stated policy in the Federal Tort Claims Act, Pet. App. 37 (*see also* Sec. II.C, *infra*).

None of these reasons concern the official or private actor status of the defendant. Thus, the D.C. Circuit's decision does not implicate the circuit split claimed by Petitioners.

2. The Circuit Split Claimed by Petitioners Is Neither Clear Nor Entrenched

Moreover, any circuit split regarding the availability of an ATS claim for torture against private actors is not as clear as Petitioners claim, and is certainly not entrenched. Petitioners do not mention a unanimous consensus, even among the circuits on which they rely, that the law of nations recognizes a universal bar only on *official* torture—*i.e.*, torture by government actors, not private actors. *See Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995) ("[T]orture and summary executions—

when not perpetrated in the course of genocide or war crimes—are proscribed by international law only when committed by state officials or under color of law."); *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) ("[D]eliberate torture perpetrated *under color of official authority* violates universally accepted norms . . . .") (emphasis added); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1265 (11th Cir. 2009) ("State-sponsored torture, unlike torture by private actors, likely violates international law and is therefore actionable under the [ATS]."") (quoting *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247 (11th Cir. 2005)); Pet. App. 34 ("Although torture committed by a state is recognized as a violation of settled international norm, that cannot be said of private actors.") (citing *Sanchez-Espinoza*, 770 F.2d at 206-07); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J., concurring).[3]

The exception to this state-action requirement that has been recognized in the Second and Eleventh Circuits

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3. The above decisions have relied on the international conventions and congressional statutes defining torture. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment art. 1, para. 1, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85 (limiting definition of torture to acts by "a public official or other person acting in an official capacity"); Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91-92, U.N. Doc. A/10034 (Dec. 9, 1975) (requiring that the actor be "a public official"); Torture Victim Protection Act, § 2(a), 28 U.S.C. § 1350 note (2006) (establishing right of action only against individuals acting "under actual or apparent authority, or color of law, of any foreign nation").

extends *only* to torture committed in the course of genocide or war crimes. *Kadic*, 70 F.3d at 244; *Sinaltrainal*, 578 F.3d at 1266-67. This case involves no allegations of genocide. The Court of Appeals, focusing on Petitioners' claims as Petitioners presented them in the Court of Appeals, ruled that Petitioners had not raised sufficient allegations of war crimes to remove their torture allegations from the general requirement of state action. Pet. App. 33-34 & nn.12 & 13. Similarly, the D.C. Circuit precedents on which the Court of Appeals relied involved claims of torture, but not genocide or war crimes. *Sanchez-Espinoza*, 770 F.2d at 205-07; *Tel-Oren*, 726 F.2d at 791, 795. Thus, this case does not present any circuit conflict regarding the genocide or war crimes question ruled upon in *Kadic*.[4]

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4. Indeed, the D.C. Circuit distinguished *Kadic* rather than departed from it. First, the court noted that despite its apparently broad language, *Kadic's* facts, and therefore its holding, concerned a quasi-state actor, "the self-proclaimed President of the Serbian Republic of Bosnia-Herzegovina" or "Srpska." Pet. App. 32. The court noted that "[w]hile Srpska was not yet internationally recognized as a state—thus technically rendering its militia a private entity—a quasi-state entity such as Radovan Karadzic's militia is easily distinguishable from a private actor such as Titan" (or CACI). *Id.* Second, the court specifically noted that even if "'war crimes' have a broader reach" than torture, Petitioners "have not brought to our attention any specific allegations of such behavior," and that the district court, considering Petitioners' ATS argument, "analyzed only an asserted international law norm against torture, not war crimes." Pet. App. 34 n.13; *see* Pet. App. 121-24 (*Ibrahim*), *adopted in* Pet. App. 109-11 (*Saleh*).

B. This Case Is a Poor Vehicle For Deciding the First Question Presented

This case is also a poor vehicle for deciding the first question presented, because there are substantial barriers to reaching that question.

Petitioners challenge conduct of the U.S. military, and allege that Respondents conspired with the U.S. military. This raises a host of issues that will interfere with this Court's ability to reach the question Petitioners present—whether the ATS can give rise to a torture claim against purely private actors. For instance:

1. CACI here raises two preemption defenses. *First*, the Constitution's commitment of the nation's war power to the political branches proscribes judicial review of common-law tort claims based on the conduct of military interrogations (either by military personnel acting in alleged conspiracy with CACI, or by CACI personnel acting under government or military policy). Pet. App. 23, 25; *see* note 21, *infra*, & accompanying text; *see also* Oral Arg. Tr. at 18-22, *Saleh v. CACI Int'l Inc*, Nos. 08-7001, 08-7030, 08-7044, 08-7045 (D.C. Cir. Feb. 9, 2010); Oral Arg. Tr. at 20-21, 74-76, *Saleh v. Titan Corp.*, Nos. 08-7008, 08-7009 (D.C. Cir. Feb. 9, 2010). *Second*, the FTCA's combatant activities exception embodies a congressionally-stated policy and a unique federal interest that the nation's battle activities be conducted free from judicial or common-law oversight.

See Pet. App. 37; *see also* Sec. II.C, *infra* (discussing Pet. App. 9-29).[5]

2. Because Petitioners allege conspiracy with military personnel, defenses such as sovereign immunity or absolute official immunity may also come into play. *See* Pet. App. 10 (noting sovereign immunity defenses reserved). Indeed, such defenses are likely the reasons Petitioners have not sued the United States or any military personnel directly. Respondents may be entitled, however, to dismissal based on the political question doctrine, or immunity based on doctrines such as derivative absolute official immunity or derivative sovereign immunity. *See Westfall v. Erwin*, 484 U.S. 292, 295-97 & n.3 (1988); *Mangold v. Analytic Servs.*, 77 F.3d 1442, 1446-50 (4th Cir. 1996); *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 72-73 (2d Cir. 1998); *Slotten v. Hoffman*, 999 F.2d 333, 336-37 (8th Cir. 1993).

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5. The *amici curiae* law professors argue that the federal preemption defense recognized by the D.C. Circuit cannot preempt an ATS claim, because both are matters of federal common law, such that one is not *lex superior* over the other. Brief of *Amici Curiae* Professors of Federal Courts, International Law, and U.S. Foreign Relations Law at 10-15. But the law professors focus only on the D.C. Circuit's extension of a federal preemption defense under *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988) (based on a congressional policy stated in the Federal Tort Claims Act). The law professors overlook that the Constitution itself, by assigning War powers exclusively to the political branches (*see* note 21, *infra*), occupies the field and precludes judicial review of our nation's conduct of war through common-law rights of action. *See* Pet. App. 23, 25. The enumeration of congressional and executive power in Article I and Article II is certainly *lex superior* to federal courts' exercise of common law power to divine new rights of action for violations of the law of nations under a federal statute, the ATS.

None of these concerns were present in the Second and Eleventh Circuit decisions on which Petitioners rely. All of those cases concerned allegations against private parties alleged to have acted in concert with *foreign* officials, *see Sinaltrainal*, 578 F.3d at 1257; *Romero v. Drummond Co.*, 552 F.3d 1303, 1308-09 (11th Cir. 2008); *Presbyterian Church v. Talisman Energy, Inc.*, 582 F.3d 244, 247 (2d Cir. 2009); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 168-70 (2d Cir. 2009); *Khulumani v. Barclay Nat'l Bank*, 504 F.3d 254, 258-59 (2d Cir. 2007), *aff'd mem.*, 553 U.S. 1028 (2008), or in one case allegations against a foreign quasi-state official, *Kadic*, 70 F.3d at 236. Thus, those cases did not raise any possibility of separation of powers or federal preemption defenses.

In *Carmichael v. Kellogg, Brown & Root*, No. 09-683, the Solicitor General advised against certiorari review, in part because the presence of preemption or related defenses created potential obstacles to reaching the question presented for review (there, the applicability of the political question doctrine). Similarly here, the presence of the political question doctrine and significant preemption and immunity defenses stand as obstacles to the Court's reaching the ATS question.

C. The Court of Appeals' Rejection of Petitioners' ATS Claims Was Correct

Finally, the Court of Appeals' rejection of Petitioners' ATS claim under *Sosa* was correct.

As explained above, the D.C. Circuit had "little trouble" rejecting Petitioners' "stunningly broad" ATS claim, Pet. App. 32-33, where Petitioners expressly

disavowed any limitation to "torture" as defined by treaty or statute, but instead included all forms of physical force (such as "assault and battery"), Pet. App. 33 & n.12. The D.C. Circuit rightly termed Petitioners' claims "an untenable, even absurd, articulation of a supposed consensus of international law." Pet. App. 33.

Apart from the breadth of Petitioners' claims, the D.C. Circuit was correct to focus on the judicial restraint commanded by *Sosa*. In *Sosa*, this Court noted five reasons counseling great caution in recognizing new common-law rights of action under the law of nations: *first*, the modern understanding that the law is made, not discovered; *second*, a significant rethinking of the role of federal courts in making the law; *third*, the modern view that creation of private rights of action is better left to legislative judgment; *fourth*, considerations of adverse foreign policy consequences; and *fifth*, the lack of a congressional mandate to seek out and define new violations of the law of nations. *See Sosa*, 542 U.S. at 725-28; *Presbyterian Church*, 582 F.3d at 255 (summarizing *Sosa*); Pet. App. 121-22 (same).

All five *Sosa* factors, and especially the third and fifth, suggest the most important factor in recognizing a new cause of action under the law of nations is whether Congress has indicated the right of action should exist. *See Sosa*, 542 U.S. at 726-28; *see also, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001), *cited with approval in Sosa*, 542 U.S. at 727. This makes eminent sense, given that the Constitution assigns to Congress the "Power . . . To define and punish . . . Offences against the Law of Nations." U.S. Const. art. I, § 8, cl. 10.

With regard to Petitioners' claims,

> it is not as though Congress has been silent on the question of torture or war crimes. Congress has frequently legislated on this subject in such statutes as the [Torture Victim Protection Act, 28 U.S.C. § 1350 note], the Military Commissions Act, 10 U.S.C. § 948a *et seq.*, the federal torture statute, 18 U.S.C. §§ 2340-2340A, the War Crimes Act, 18 U.S.C. § 2441, and the Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq.* . . .

Pet. App. 35. Despite this panoply of legislation, "Congress has never created this cause of action." *Id.*

Most significantly, in the TVPA, Congress *has* created a private right of action for torture, but has done so *only for torture under color of foreign law.* TVPA § 2(a), 28 U.S.C. § 1350 note; *see also* Pet. App. 36. Congress, which is charged with implementing the United States' obligations under international treaties including the Convention Against Torture, has decided that alleged torture under color of U.S. law should be remedied through criminal penalties, not a private right of action.[6] Where Congress has created certain

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6. Notably, in *Arar v. Ashcroft*, No. 09-923, the Acting Solicitor General argued "it is significant that when Congress created a damages remedy in the TVPA, it did not extend that remedy to the conduct of United States officials acting under color of United States law," and that this omission argued against implying such a remedy. Brief for John D. Ashcroft [*et al.*] in Opposition at 24, *Arar v. Ashcroft*, No. 09-923 (filed May 12, 2010) ("Ashcroft Br.").

remedies, the courts should be wary of creating others through implication from the common law. *See Sandoval*, 532 U.S. at 290 ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.").[7] Again, federal courts should be especially hesitant where recognition of a new common-law right of action would intrude on the foreign policy prerogatives of the political branches. *Sosa*, 542 U.S. at 727-28 (citing *Tel-Oren*, 726 F.2d at 813 (Bork, J., concurring)); *see also* Ashcroft Br., *supra* note 8, at 12-15.

With Congress having exercised its judgment and prerogative, the federal courts, under *Sosa*, should not create an additional private right of action through common law implication from the law of nations.

II. The Court of Appeals' Preemption Decision Does Not Warrant Review

The Court of Appeals' preemption decision concerns a single issue: whether a *state* can regulate the conduct of war by providing a tort remedy against contractors for the conduct of employees performing combatant activities while integrated into United States military units. The Court of Appeals determined that two aspects of federal law preempted such state-law tort actions:

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7. The *Arar* federal defendants similarly argued that where Congress has created statutory remedies, federal courts should not imply a private right of action (there, a *Bivens* action) on top of what Congress has provided. *See* Ashcroft Br., *supra* note 6, at 12, 19-23.

(1) the Constitution's allocation of foreign policy and war powers exclusively to the federal government; and (2) the federal interests embodied in the combatant activities exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(j) (2006). Pet. App. 9.

Despite Petitioners' suggestions to the contrary, Pet. 32-37, the Court of Appeals' preemption decision does not confer *immunity* on contractors. Pet. App. 10. Nor does it preclude application of federal criminal laws,[8] the creation by Congress of a federal remedy for combat-related injuries, or establishment of an administrative compensation scheme by the Executive. Indeed, as the Court of Appeals observed, "[t]he U.S. Army Claims Service has confirmed that it will compensate detainees who establish legitimate claims for relief under the Foreign Claims Act, 10 U.S.C. § 2734."[9] Thus, the Court of Appeals' preemption decision did not impede the *federal* regulation of contractors and their employees performing combatant activities alongside military personnel, but concerned only whether the *states* have a permissible role in regulating perhaps the most peculiarly federal governmental function, the prosecution of war.

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8. Pet. App. 3 ("While the federal government has jurisdiction to pursue criminal charges against the contractors should it deem such action appropriate . . . .").

9. Pet. App. 4. As the Court of Appeals noted, one of the plaintiffs did in fact file an administrative claim alleging detainee abuse. He was offered $5,000 as compensation for his detention even though the U.S. Army's investigation determined that, contrary to the claimant's allegations, he was never interrogated or abused while detained at Abu Ghraib prison. *Id.*

The Court of Appeals' preemption decision does not warrant review by this Court because the decision does not involve a circuit split, is consistent with this Court's preemption jurisprudence, and does not implicate the immunity issue identified in Petitioners' proposed question presented.

A. The Court of Appeals' Decision Does Not Implicate Derivative Sovereign Immunity as the Second Question Presented Suggests

Petitioners' second question presented asks the Court to review whether the Court of Appeals properly "extend[ed] derivative sovereign immunity to contractors." This is an incorrect characterization of the Court of Appeals' decision. The Court of Appeals expressly noted that, while CACI and Titan had asserted immunity defenses in the district court, those defenses had been reserved and were not before the Court of Appeals. Pet. App. 10. Indeed, the Court of Appeals proceeded just as this Court had in *Boyle*, 487 U.S. at 505 n.1, deciding the case on preemption grounds without resolving whether CACI and Titan also were entitled to immunity from suit. Pet. App. 9-10.

As a result, to the extent Petitioners' second question presented concerns the propriety of "extend[ing] derivative sovereign immunity to contractors," Pet. at i, this case does not present such a question and would be an inappropriate vehicle for deciding immunity-related issues.

B. The Court of Appeals' Preemption Decision Does Not Involve Any Claimed Circuit Split

Petitioners do not assert that the Court of Appeals' preemption decision creates a circuit split, nor could they.

State-law tort suits in which plaintiffs seek monetary compensation from contractors for combat-related injuries are a relatively new phenomenon. A few Court of Appeals decisions have considered the extent to which the political question doctrine bars state-law tort claims against contractors for combat-related injuries.[10] *Saleh*, however, is the first, and thus far only, Court of Appeals decision to determine the appropriate analytical framework for determining when state-law tort claims against contractors providing services in a combat zone are preempted by federal law.[11] In addition to *Saleh*, there are a few other pending tort suits against contractors for combat-related injuries, but none of

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10. *See, e.g.*, *Carmichael v. Kellogg, Brown & Root Serv., Inc.*, 572 F.3d 1271, 1281-83 (11th Cir. 2009), *cert. denied* (U.S. June 28, 2010); *Lane v. Halliburton*, 529 F.3d 548, 567 (5th Cir. 2008); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1358-64 (11th Cir. 2007).

11. In *Koohi v. United States*, 976 F.2d 1328, 1337 (9th Cir. 1992), the court preempted tort claims against a procurement contractor based on its conclusion that the claimants' injuries occurred as a result of combatant activities. This decision is consistent with the D.C. Circuit's holding in *Saleh* that tort claims against a contractor are preempted where, during wartime, "a private service contractor is integrated into combatant activities over which the military retains command authority." Pet. App. 19.

these other cases has yet been the subject of a Court of Appeals decision.[12]

Because *Saleh* is the first Court of Appeals decision to consider the analytical framework for preemption of combat-related tort claims against contractors providing services in a combat zone, there is no circuit conflict that requires resolution by this Court. As a result, this Court's consideration of any preemption issues arising out of combat-related tort suits against contractors would benefit from further development of this area of the law by the Courts of Appeals. Indeed, as the United States recently opined in recommending denial of certiorari in *Carmichael*, "[i]n the end, consideration of the applicability of various defenses in suits against contractors supporting military operations in war zones would benefit greatly from further percolation."[13] This

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12. *See, e.g.*, *Harris v. Kellogg, Brown & Root Servs., Inc.*, 618 F. Supp. 2d 400, 432-33 (W.D. Pa. 2009), *appeal docketed*, No. 09-2325 (3d Cir. May 5, 2009); *Al Shimari v. CACI Premier Tech., Inc.*, 657 F. Supp. 2d 700, 724 (E.D. Va. 2009), *appeal docketed*, No. 09-1335 (4th Cir. Mar. 26, 2009); *Taylor v. Kellogg, Brown & Root Servs., Inc.*, No. 2:09-cv-341, 2010 WL 1707530, at *9 (E.D. Va. Apr. 16, 2010), *appeal docketed*, No. 10-1543 (4th Cir. May 14, 2010); *Fisher v. Halliburton*, No. H-05-1731, slip op. at 1-2 (S.D. Tex. Jan. 26, 2010), *appeal docketed*, No. 10-20202 (5th Cir. Mar. 31, 2010); *see also Al-Quraishi v. Nakhla*, No. 8:08-cv-1696 (D. Md. filed June 30, 2008).

13. Br. of United States as Amicus Curiae at 22, *Carmichael v. Kellogg, Brown & Root Serv., Inc.*, No. 09-683 (U.S. filed May 28, 2010) ("Often the law develops in a more satisfactory fashion if this Court withholds review of novel issues until differing views have been expressed by other federal courts." (footnote omitted) (citing and quoting *Vasquez v. United States*, 454 U.S. 975, 976 (Stevens, J., respecting the denial of certiorari))).

is particularly true with respect to the defense of federal preemption, as *Saleh* is the only Court of Appeals decision on this subject.

C. There Is No Conflict With This Court's Decisions in *Boyle* or *Wyeth*

Unable to claim a circuit split arising out of the Court of Appeals' preemption decision, Petitioners base their petition on a request for error correction, claiming that the Court of Appeals' decision conflicts with this Court's decisions in *Boyle*, 487 U.S. at 507, and *Wyeth v. Levine*, 129 S. Ct. 1187, 1206 (2009). Both of these assertions are incorrect. Neither the Court of Appeals' holding of combatant activities preemption under *Boyle* nor its finding of constitutional preemption pursuant to the constitutional allocation of war powers to the federal government is the slightest bit inconsistent with this Court's analysis in *Boyle* and *Wyeth*.

1. The D.C. Circuit's Conflict Preemption Analysis is Consistent with *Boyle*

In *Boyle*, 487 U.S. at 500, the Court announced the framework under which FTCA exceptions preempt tort claims against government contractors. The first requirement is that the dispute involve "'uniquely federal interests' [that] are . . . committed by the Constitution and laws of the United States to federal control." *Id.* at 504 (citations omitted). Once a unique federal interest is shown, preemption is appropriate where "a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law,' or the application of state law would

'frustrate specific objectives' of federal legislation." *Id.* at 507 (alteration in original) (internal citations omitted). Based on these conflict preemption principles, the Court in *Boyle* fashioned a specific test for deciding the case before it—namely, a test for identifying when allowing state-law product liability claims against government contractors would significantly conflict with the federal interests embodied in the discretionary function exception. *Id.* at 509-12.

The D.C. Circuit followed this precise framework in deciding *Saleh*. The court began with the text of the combatant activities exception—which retains sovereign immunity for "[a]ny claim arising out of the combatant activities of the military or naval forces . . . during time of war."[14] After surveying case law addressing this exception, the court determined that the federal policy embodied by the exception is "simply the elimination of tort from the battlefield, both to preempt state or foreign regulation of federal wartime conduct and to free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit."[15] The D.C. Circuit then determined that state tort claims against contractors significantly conflicted with this important federal interest when, during wartime, "a private service contractor is integrated into combatant activities over which the military retains command authority." Pet. App. 19.

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14. 28 U.S.C. § 2680(J) (2006).

15. Pet. App. 14-15 (citing and discussing *Koohi*, 976 F.2d at 1334-35, *Johnson v. United States*, 170 F.2d 767, 769 (9th Cir. 1948), *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 18 (D.D.C. 2005), and *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1493 (C.D. Cal 1993)).

The Court of Appeals' analysis not only poses no conflict with this Court's preemption analysis in *Boyle*, but explicitly applies this Court's analysis in *Boyle*. The Court of Appeals correctly stated the general rule for preemption under *Boyle*—preemption is appropriate where a federal statute embodied "uniquely federal interests" and the application of state tort law would significantly conflict with such uniquely federal interests. Pet. App. 11. The Court of Appeals then applied this rule to specific federal interests embodied in the combatant activities exception, a statutory provision not at issue in *Boyle*.[16] Thus, Petitioners' true contention is that *Saleh* involved a "misapplication of a properly stated rule of law," S. Ct. R. 10, a contention that is incorrect here, but even where correct is rarely an appropriate basis for review by this Court.[17]

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16. Petitioners argue that Defense Department rulemaking comments from 2008 evince the military's policy choice to rely on state tort law to regulate the conduct of contractors supporting military forces in war zones. Pet. 37. The Court of Appeals correctly rejected this premise, Pet. App. 20-21. Moreover, the United States has expressly repudiated Petitioners' interpretation of the rulemaking commentary, making clear that the Defense Department was neither stating policy nor opining on the state of the law. Brief for United States as Amicus Curiae at 12 n.4, *Carmichael v. Kellogg, Brown & Root Serv., Inc.*, No. 09-683 (U.S., filed May 28, 2010).

17. Petitioners also contend that the D.C. Circuit's decision here conflicts with this Court's preemption jurisprudence because the exceptions to the FTCA do not apply to contractors. Pet. 29. In that regard, Petitioners' quarrel is with *Boyle* itself, as this Court expressly held in *Boyle* that FTCA exceptions, though not bestowing contractors with sovereign immunity, can supply the unique federal interest that supports preemption of state tort claims against contractors. *Boyle*, 487 U.S. at 509. The D.C. Circuit made this point in rejecting this same argument. Pet. App. 12.

2. The D.C. Circuit's Decision in *Saleh* Does Not Conflict With *Wyeth*

Petitioners also err in contending that the D.C. Circuit's decision in *Saleh* conflicts with this Court's decision in *Wyeth*.

Wyeth's holding—that federal drug laws do not preempt state tort law regarding a manufacturer's duty to warn of risks—rested on "two cornerstones" of preemption jurisprudence: *first*, the "touchstone" of congressional purpose, and *second*, a presumption against preemption in areas traditionally subject to state regulation. *Wyeth*, 129 S. Ct. at 1194-95.

Following this Court's command in *Wyeth*, the Court of Appeals in *Saleh* extensively considered the purpose underlying the combatant activities exception to the FTCA in determining whether preemption was appropriate. Pet. App. 14-15, 23 (analyzing plain meaning of combatant activities exception and citing case law regarding the federal interest embodied in the combatant activities exception). Moreover, *Saleh*, unlike *Wyeth*, also involves constitutional expressions of federal interest, and the Court of Appeals considered the interests embodied in the relevant constitutional provisions in determining that the Constitution preempted Petitioners' state-law claims. *See* Pet. App. 25-28 (analyzing the federal interest in the unfettered conduct of war as embodied in the United States Constitution).

Wyeth's second premise, based on wariness against infringing traditional state authority, highlights a critical distinction between this case and *Wyeth*. In *Wyeth*, this Court found state tort suits were the traditional remedy for consumers injured by unsafe drugs, 129 S. Ct. at 1199-1200, and that far from displacing that remedy, Congress had been careful to preserve state authority, *id.* at 1195-96, leaving state tort law in place as a "complementary form of drug regulation." *Id.* at 1202.

This case, by contrast, involves the nation's warmaking power—a power never committed to state authority, but instead reserved by our founding document solely to the federal government. The Constitution entrusts the conduct of war exclusively to Congress and the President,[18] and affirmatively divests the states of any corresponding role.[19] Thus, unlike the

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18. *See* U.S. Const. art. I, § 8, cls. 1, 11-16 (granting Congress the powers to provide for the common Defence; declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; raise Armies and a Navy; make Rules governing the land and naval Forces; provide for calling forth the Militia; provide for organizing, arming, and disciplining the Militia, and for governing them when called into national service; and make all Laws necessary and proper to those ends); U.S. Const. art. II, § 2, cl. 1 (designating President as Commander in Chief); *see also Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950); *The Federalist* Nos. 24, 69 (Hamilton).

19. *See* U.S. Const. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation [or] grant Letters of Marque and Reprisal . . . ."); *id.* § 10, cl. 3 ("No State shall, without the consent of Congress . . . keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent danger as will not admit of delay.").

regulation of drugs, regulation of the conduct of war is not "a field which the States have traditionally occupied," and not part of "the historic police powers of the States." *Wyeth*, 129 S. Ct. at 1194-95 (citation omitted); *see also* Pet. App. 23 ("Unlike tort regulation of dangerous or mislabeled products, the Constitution specifically commits the Nation's war powers to the federal government, and as a result, the states have traditionally played no role in warfare."). As a result, there can be no federalism-based presumption against preemption here, and there is no conflict between the D.C. Circuit's decision here and this Court's decision in *Wyeth*.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition.

Respectfully submitted,

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JUN 28 2010

No. 09-1313

In the Supreme Court of the United States

HAIDAR MUHSIN SALEH, ET AL., PETITIONERS

v.

CACI INTERNATIONAL INC,
CACI PREMIER TECHNOLOGY, INC., AND
TITAN CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT TITAN CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that claims of mere abuse or harm are not actionable as violating a settled consensus of international law under the Alien Tort Statute, 28 U.S.C. 1350.

2. Whether the court of appeals correctly held that petitioners' common-law tort claims are preempted by federal law.

CORPORATE DISCLOSURE STATEMENT

Since the filing of the complaint, respondent Titan Corporation has been renamed L-3 Services, Inc. L-3 Services is wholly owned by L-3 Communications Corporation, which in turn is wholly owned by L-3 Communications Holdings, Inc. No publicly held company owns 10% or more of L-3 Communications Holdings' stock.

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In the Supreme Court of the United States

No. 09-1313

HAIDAR MUHSIN SALEH, ET AL., PETITIONERS

v.

CACI INTERNATIONAL INC,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT TITAN CORPORATION IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-83) is reported at 580 F.3d 1.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 2009. A petition for rehearing was denied on January 25, 2010 (Pet. App. 139-140). The petition for a writ of certiorari was filed on April 26, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Over the last decade, the American military has increasingly relied on contract employees because of shortages in the number of soldiers available to perform critical wartime tasks. In the wake of the invasion of Iraq, the military had a particularly acute need for translators fluent in Arabic. Accordingly, the government contracted with respondent Titan Corporation to provide translators in Iraq. Those translators were embedded in the military units to which they were assigned; they lived and worked alongside military personnel and were under the direct command and exclusive operational control of the military. Pet. App. 3, 93-98.

The military assigned several Titan translators to provide services at the Abu Ghraib prison in Baghdad. When the abuses of prisoners at Abu Ghraib came to light, the government undertook extensive investigations into the potential culpability of both military and contract personnel. A number of service members were court-martialed, but the government decided not to pursue criminal charges against any of the contract employees. The government also decided not to pursue any contractual remedies against either Titan or respondent CACI International (CACI), which had contracted to provide interrogators. Pet. App. 3-4.

2. In 2004, petitioners, Iraqi nationals detained at Abu Ghraib and their family members, brought suit against respondents. As is relevant here, the complaint included claims under the Alien Tort Statute (ATS), 28 U.S.C. 1350, and various common-law tort claims. Pet. App. 5-8; 84-85; 119-120.

Respondents moved to dismiss the complaint. The district court granted the motion as to the ATS claims, but denied it as to the common-law tort claims. Pet.

App. 107-117. With regard to the ATS claims, the district court reasoned that "the conduct of private parties described by [petitioners'] allegations was not actionable under the ATS's grant of jurisdiction as violative of the law of nations." *Id.* at 110. With regard to the common-law tort claims, the court determined that it required additional evidence before it could rule on respondents' defense that the claims were preempted by federal law. *Id.* at 114-115.

After discovery, respondents moved for summary judgment on the common-law tort claims, renewing their preemption defense. The district court granted summary judgment to Titan but denied it to CACI. Pet. App. 84-106. In ruling on respondents' preemption defense, the district court applied the rationale of this Court's decision in *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988), and looked to the policies underlying the combatant-activities exception of the Federal Tort Claims Act (FTCA), 28 U.S.C. 2680(j). Pet. App. 89-91. The court reasoned that the combatant-activities exception safeguards the military chain of command by "eliminat[ing] the possibility that state law liability could cause a soldier to second-guess a direct order." *Id.* at 91. The court ultimately held that, as applied to contract employees serving in combat situations, preemption is appropriate where the employees "are under the direct command and exclusive operational control of the military chain of command such that they are functionally serving as soldiers." *Ibid.* The court reasoned that, in those circumstances, "preemption ensures that [contract employees] need not weigh the consequences of obeying military orders against the possibility of exposure to state law liability." *Ibid.* Applying that standard, the court determined that there was no dispute that Titan's

employees were "fully integrated into the military units to which they were assigned" or that "they performed their duties under the direct command and exclusive operational control of military personnel." *Id.* at 103. The court determined, however, that a material dispute of fact still existed as to whether CACI's employees were subject to exclusive military control. *Id.* at 104-105.

3. Petitioners appealed the final judgment in favor of Titan; CACI filed an interlocutory appeal from the denial of summary judgment on its preemption defense. The court of appeals affirmed in part and reversed in part, upholding the dismissal of the ATS claims and holding that the common-law tort claims were preempted as to both respondents. Pet. App. 1-83.

a. As to the ATS claims—before the court of appeals only with regard to Titan—the court of appeals noted at the outset that petitioners had chosen, "for whatever reason," to limit their factual allegations on appeal to claims of "abuse" or "harm," and did not make any specific allegations of torture or war crimes. Pet. App. 4. Noting this Court's admonition in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), that "judicial restraint" is required in recognizing new categories of actionable norms under the ATS, the court of appeals had "little difficulty" in upholding the dismissal of petitioners' claims against Titan. Pet. App. 32. The court explained that "[petitioners'] claim that any 'abuse' inflicted or supported by Titan's translator employees on plaintiff detainees is condemned by a settled consensus of international law" was "stunningly broad" and "an untenable, even absurd, articulation of a supposed consensus of international law." *Id.* at 33. The court added that, even if petitioners had adequately alleged torture, the suit might still run afoul of *Sosa*'s requirement of a violation

of an international norm, because any such torture here would be by private actors. *Id.* at 34. While noting "it may be that 'war crimes' have a broader reach," *id.* at 34 n.13, the court reiterated that petitioners "have not brought to our attention any specific allegations of such behavior," *ibid.* The court concluded by noting that there were numerous other potential bases for upholding the dismissal of petitioners' ATS claims, including that the contractors would be entitled to immunity, *id.* at 34-35; that Congress had legislated in the area without creating an available cause of action, *id.* at 35-36; and that recognizing a cause of action here "would impinge on the foreign policy prerogatives of our legislative and executive branches," *id.* at 36.

b. As to the common-law tort claims, the court of appeals, like the district court, applied the rationale of *Boyle* and looked by analogy to the combatant-activities exception of the FTCA, 28 U.S.C. 2680(j). Pet. App. 9-29. The court of appeals explained that it was undisputed that the case involved combatant activities and implicated a significant federal interest. *Id.* at 13. As a result, the only question was whether the conflict between the application of state tort law and the policies underlying the FTCA's combatant-activities exception was significant enough to warrant preemption. *Id.* at 13-14. The court explained that, where, as here, the contract employees at issue were "in fact integrated and performing a common mission with the military under ultimate military command," *id.* at 13, "all of the traditional rationales for *tort* law—deterrence of risk-taking behavior, compensation of victims, and punishment of tortfeasors—are singularly out of place," *id.* at 14-15. The court added that the costs of imposing tort liability would be passed through to the government (and thus to

the American taxpayer), *id.* at 16, and that imposing state-law tort liability on contract employees would mean that the military would be "haled into lengthy and distracting court or deposition proceedings," *ibid.*

Based on those considerations, the court of appeals held that the district court's "exclusive operational control" test "does not protect the full measure of the federal interest embodied in the combatant activities exception," because federal interests can be implicated even when a contractor exerts some measure of control alongside that exercised by the military. Pet. App. 18. Instead, the court of appeals concluded that, "[d]uring wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted." *Id.* at 19. Applying that standard, the court determined that the claims against both Titan and CACI were preempted. *Id.* at 29.

The court of appeals proceeded to hold, in the alternative, that "even in the absence of *Boyle* the plaintiffs' claims would be preempted * * * because, under the circumstances, the very imposition of *any state law* created a conflict with federal foreign policy interests." Pet. App. 25, 28. Relying primarily on *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000), and *American Insurance Ass'n* v. *Garamendi*, 539 U.S. 396 (2003), the court reasoned that "[t]he states (and certainly foreign entities) constitutionally and traditionally have no involvement in federal wartime policy-making." Pet. App. 25.

c. Judge Garland dissented with regard to the common-law tort claims only. Pet. App. 38-83. He agreed with the majority that *Boyle* supplied the correct analyt-

ical framework for the preemption analysis, *id.* at 48; that the area implicated uniquely federal interests, *id.* at 49; and that, at least in theory, it might be proper to find preemption under *Boyle* for some combatant activities, *id.* at 74-75. He contended, however, that the applicable test for preemption with regard to combatant activities should be narrower than that applied by the majority, *id.* at 75-79, and concluded that the duties imposed by tort law would be congruent with the policies underlying the FTCA's combatant-activities exception. *Id.* at 74. As to the majority's alternative basis for preemption, he contended that the cases relied upon by the majority were inapposite. *Id.* at 56-69.

ARGUMENT

Petitioners contend that the court of appeals erred by holding that their claims are not actionable as violating a settled consensus of international law under the ATS and that their common-law tort claims are preempted by federal law. The court of appeals' decision is correct in each respect and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore unwarranted.

1. With regard to their ATS claims, petitioners contend (Pet. 14-19) that this Court should grant review to resolve a purported circuit conflict on whether state action is required to pursue an ATS claim based on allegations of torture and war crimes. Because any such conflict is not implicated by the decision below, that issue does not warrant further review in this case.

a. In the decision under review, the court of appeals noted at the outset that petitioners had chosen to limit their factual allegations on appeal to claims of "abuse" or "harm," and thus did not make any specific allegations of torture or war crimes. Pet. App. 4. The court of appeals

accordingly analyzed the question of whether petitioners' claims are actionable under the ATS on that premise, ultimately holding that there is no universally recognized norm barring any "abuse" or "harm" of prisoners, regardless of whether the alleged misconduct involved a public or private actor. *Id.* at 32-33. Petitioners make no attempt to challenge that legal holding: *viz.*, that simple "abuse" or "harm" does not rise to the level of violating a settled international consensus (and claims based on "abuse" or "harm" are therefore not actionable under the ATS). Nor would there be any basis for doing so, because no court of appeals has held that such claims are actionable.

Petitioners suggest (Pet. 14 n.4) that the premise of the court of appeals' analysis was incorrect because they alleged specific instances of torture and war crimes in their complaint. Petitioners do not dispute, however, that they argued below that "assault and battery [is prohibited] by the law of nations." Pet. App. 33 n.12. Unsurprisingly, the court of appeals relied on petitioners' own representations concerning the nature of their claims, stressing that petitioners had not made a single specific factual allegation of torture or war crimes in their briefs on appeal. See *id.* at 4. The court explained that it was "entitled * * * to take [petitioners'] cases as they present them to us." *Ibid.*

As a result, the court of appeals proceeded to address only the question of whether any abuse or harm "is condemned by a settled consensus of international law," Pet. App. 33, and held with "little difficulty" that petitioners' position was "an untenable, even absurd, articulation of a supposed consensus of international law," *id.* at 32-33. Although the court of appeals (relying on its own earlier decisions) expressed its doubts as to whether private ac-

tors could be liable on claims of torture under the ATS, it did so in dicta—"[a]ssuming, *arguendo*, that [petitioners] had adequately alleged torture (or war crimes)." *Id.* at 34. And in rejecting the contention that claims of mere abuse or harm are actionable under the ATS, the court of appeals relied primarily on an earlier decision *involving state action*: specifically, claims concerning alleged abuse by the Libyan police. See *id.* at 33 (citing *Price* v. *Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002)). It is therefore clear that the court of appeals rejected petitioners' claims on the premise that petitioners were pursuing only claims of abuse or harm, not that they had alleged private conduct.

To the extent that petitioners now contend that they are in fact pursuing claims of torture and war crimes (and that the relevant legal question in this case is therefore whether their claims of torture and war crimes are actionable under the ATS), that contention is forfeited because it was not preserved below and is evidently fact-bound, turning on the appropriate characterization of these particular plaintiffs' claims. Because petitioners ask this Court to decide a different legal question from the one that was pressed and passed upon below, further review on the ATS question is unwarranted.

b. In any event, there is no genuine conflict among the courts of appeals on the question on which petitioners now seek review—*i.e.*, whether state action is required to pursue an ATS claim based on allegations of torture. In an opinion written by then-Judge Scalia, the District of Columbia Circuit previously held that there was no international consensus that private acts of torture and other crimes were actionable under the ATS. See *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 206-207 (D.C. Cir. 1985). Assuming, *arguendo*, that petitioners

had adequately argued torture to the court of appeals, the decisions that petitioners argue create a split of authority are in agreement that private torture is not actionable under the ATS. See, *e.g.*, Pet. App. 34; *Kadic* v. *Karadzic*, 70 F.3d 232, 243-244 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996); *Sinaltrainal* v. *Coca-Cola Co.*, 578 F.3d 1252, 1265-1266 (11th Cir. 2009). And while the Second Circuit held that genocide, crimes against humanity, and war crimes are actionable when performed by the belligerent militia of a self-declared but unrecognized state, see *Kadic*, 70 F.3d at 237, that case involved different norms, different degrees of state action, and assessments of international consensus made at a different time, and therefore does not squarely conflict with D.C. Circuit holdings; indeed, this Court has intimated as much. See *Sosa*, 542 U.S. at 732 n.20. And insofar as petitioners advance the debatable contention that *Kadic* and later decisions stand for the proposition that torture *in furtherance of war crimes* is always actionable against private parties, the court of appeals acknowledged that "it may be that 'war crimes' have a broader reach"—but reiterated that petitioners had failed to present specific allegations of war crimes. See Pet. App. 34 n.13.[1]

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[1] As the court of appeals noted, "[d]espite the apparent breadth" of the formulation in *Kadic*, the holding was not as broad. Pet. App. 32. "[A] quasi-state entity such as Radovan Karadzic's militia"—technically a private party—"is easily distinguishable from a private actor such as Titan." *Ibid.* None of the other appellate decisions cited by petitioners (Pet. 15-17) actually held a private actor liable for war crimes without state action. See *Presbyterian Church of Sudan* v *Talisman Energy, Inc.*, 582 F.3d 244, 247-248 (2d Cir. 2009) (affirming dismissal of ATS claims), petition for cert. filed, No. 09-1262 (Apr. 15, 2010); *Sinaltrainal*, 578 F.3d at 1268 (affirming dismissal of ATS claims); *Abdullahi* v. *Pfizer, Inc.*, 562 F.3d 163, 173

Finally, this case is distinguishable from the cases on which petitioners rely for a more fundamental reason. In contrast with the latter cases, this case involves a war being waged by the United States; those cases, by contrast, involve the actions of foreign sovereigns or belligerents. As the court of appeals noted, even if there might be a cause of action in some circumstances against private actors for torture or war crimes under the ATS, important considerations counsel against recognizing such a cause of action where the wartime activities of the United States are at issue. See Pet. App. 35-37. In any event, because this case does not present the issue on which the circuits are purportedly in conflict, that issue does not merit further review here.

2. With regard to their common-law tort claims, petitioners contend (Pet. 19-41) that this Court should grant review to consider whether their claims are preempted by federal law. That issue also does not merit further review.

a. To begin with, petitioners do not dispute that the preemption question presented by this case is one of first impression in the courts of appeals. No other court of appeals has addressed the question of preemption of claims against service contractors arising out of combatant activities. For that reason, petitioners' repeated

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(2d Cir. 2009), petition for cert. filed, No. 09-34 (July 8, 2009) (finding state action and allowing claims of medical experimentation to proceed under the ATS); *Romero* v. *Drummond Co.*, 552 F.3d 1303, 1309 (11th Cir. 2008) (affirming defense verdict on ATS claim); *Khulumani* v. *Barclay National Bank Ltd.*, 504 F.3d 254, 258-264 (2d Cir. 2007) (allowing ATS claims for apartheid to proceed); *Bigio* v. *Coca-Cola Co.*, 239 F.3d 440, 443 (2d Cir. 2000) (affirming dismissal of ATS claims based on expropriation).

contention (Pet. 5, 20, 21, 42) that the court of appeals' holding in this case is "novel" misses the mark; it is "novel" for the simple reason that the question had not previously been addressed by another court of appeals.[2]

The only other court of appeals to have considered the question of preemption of claims against contractors arising out of combatant activities did so in the context of a procurement contract for a weapons system, and likewise held that the claims were preempted. In an opinion written by Judge Reinhardt, the Ninth Circuit held that imposing tort liability on the contracting manufacturer "would create a duty of care where the combatant activities exception is intended to ensure that none exists." *Koohi* v. *United States*, 976 F.2d 1328, 1337 (9th Cir. 1992), cert. denied, 508 U.S. 960 (1993). Like the court of appeals in this case, the Ninth Circuit applied the rationale of the Court's decision in *Boyle* and looked by analogy to the combatant-activities exception of the FTCA, 28 U.S.C. 2680(j). See *Koohi*, 976 F.2d at 1336.

b. The only court of appeals decision on which petitioners rely that even touches on the "legal posture of defense contractors accompanying [a military] force," Pet. 21 n.8, involves not preemption, but the political question doctrine. See *Carmichael* v. *Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271 (11th Cir. 2009), cert. denied, No. 09-683 (June 28, 2010).[3] And in that case, as

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[2] Notably, the only district court to have considered the issue since the court of appeals' decision has agreed with it. See *Taylor* v. *Kellogg Brown & Root Servs., Inc.*, No. 2:09-cv-341, 2010 WL 1707530, at *9 (E.D. Va. Apr. 16, 2010), appeal docketed, No. 10-1543 (4th Cir. May 14, 2010).

[3] Insofar as petitioners rely (Pet. 24) on *Maleszko* v. *Correctional Services Corp.*, 229 F.3d 374 (2d Cir. 2000), rev'd on other grounds,

here, the court of appeals held that claims against a military contractor were not actionable because of potential interference with the government's wartime activities. See *id.* at 1275.

Notably, in response to an invitation from the Court, the Solicitor General recently filed a brief recommending against certiorari in *Carmichael* on the ground that courts grappling with the complex issues posed by claims arising from the conduct of military contractors operating in war zones "have just begun to flesh out how a variety of statutory, common law, and constitutional defenses should be applied in these novel and challenging circumstances." U.S. Br. at 10, *Carmichael*, *supra* (May 28, 2010). With specific reference to the decision of the court of appeals in this case, the government concluded that the Court's "consideration of the applicability of various defenses in suits against contractors supporting military operations in war zones would benefit greatly from further percolation." *Id.* at 21-22. The government cited the "obvious benefits to deferring consideration of cases arising in this context until lower courts have more fully considered [the] legal doctrines that may bar a suit or otherwise limit liability." *Id.* at 14.

c. In the absence of a circuit conflict, petitioners contend at great length that this Court should grant review simply because the decision below was incorrect. This is not the truly exceptional case, however, in which the Court's review is warranted even absent a circuit

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534 U.S. 61 (2001), that decision is readily distinguishable, because it dealt with domestic, non-military government contracts—and ultimately held that the claims at issue could go forward because the claims did not conflict with the policies underlying the discretionary-function exception. See 229 F.3d at 382.

conflict. To the contrary, this case presents the paradigmatic situation in which further percolation would be beneficial. As the government explained in its brief in *Carmichael*, lower courts considering the defenses available to government contractors have shown "an understandable discomfort with readily subjecting the actions of government contractors who provide services to the U.S. military in war zones to private civil suits under state tort law" and "evince genuine concerns about second-guessing military judgments, burdening the military and its personnel with onerous and intrusive discovery requests, and otherwise interfering with and detracting from the war effort." U.S. Br. at 13, *Carmichael*, *supra*. In the government's view, moreover, those concerns are generally "well-founded." *Ibid.* But the government explained that further percolation would help to establish "the appropriate doctrinal framework under which to determine whether a particular claim may proceed and, if so, to what extent." *Id.* at 13-14.

The same is true with specific reference to the preemption defense that served as the basis for the court of appeals' rejection of petitioners' common-law tort claims. Indeed, the government's brief in *Carmichael* itself illustrates the benefits of further percolation on that issue. In his dissenting opinion below, Judge Garland repeatedly relied on his own interpretation of comments from the Department of Defense that, in his view, took the position that military contractors were subject to civil liability under domestic law. See, *e.g.*, Pet. App. 62-63, 65, 81; see also Pet. 18 (relying on the same comments). In its brief in *Carmichael*, however, the government disavowed that interpretation, explaining that the comments were "not intended to opine on the state of the law." See U.S. Br. at 12 n.4, *Carmichael*, *supra*.

Further percolation, moreover, would not leave the conduct of military contractors unchecked. As the government explained in its brief in *Carmichael*, "[i]rrespective of the availability of private tort remedies, contractors remain subject to applicable federal criminal law and contractual remedies, the enforcement of which is under the purview of the United States Government." U.S. Br. at 14 n.7, *Carmichael*, *supra*. In fact, in the specific context of the abuses at Abu Ghraib, the U.S. Army Claims Service long ago announced that it would compensate detainees who establish that they have legitimate claims for relief. See Pet. App. 4.

d. Finally, this case would constitute a poor vehicle for consideration of the preemption issue because it is far from clear whether resolution of that issue in petitioners' favor would lead to a different outcome. Putting to one side the factual deficiencies in petitioners' claims, it is uncertain whether petitioners could prevail under any narrower standard for preemption than the standards applied by the lower courts. And petitioners would also have to prevail on the issue of whether respondents, as nongovernmental entities whose employees are integrated into military operations, are entitled to sovereign immunity. See Pet. App. 10. In any event, because there is no circuit conflict with regard to the preemption of identical or similar claims, the preemption question does not warrant further review at this time, much less in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The
Supreme Court of the United States

HAIDAR MUHSIN SALEH, et al.,

Petitioners,

v.

TITAN CORPORATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

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The United States' brief acknowledges Petitioners' allegations "that they were beaten, raped, electrocuted, deprived of food and sleep, threatened by dogs, shackled in stressful positions, stripped, exposed to extreme heat and cold, and abused sexually and in other ways by respondents' employees." U.S. Br. 1-2. It acknowledges that "such conduct during an armed conflict is a war crime." *Id.* at 8. It acknowledges serious flaws in the court of appeals' reasoning. *Id.* at 7, 11. It nonetheless asks the Court to decline certiorari and permit further "percolation," and argues that certiorari is not necessary to ensure a remedy for torture victims or accountability for perpetrators:

> The United States has at its disposal a variety of tools, enhanced in the wake of events at Abu Ghraib, to punish the perpetrators of acts of torture, to prevent acts of abuse and mistreatment, and to compensate individuals who were subjected to abusive treatment while detained by the United States military.

Id. at 8.

Respectfully, this is false. No other remedy exists for Petitioners, and Respondents have suffered no consequences for their involvement in the serious violations committed at Abu Ghraib. By extending governmental immunities to for-profit corporations not under military command, the court of appeals has denied Petitioners' only vehicle for justice and accountability, and signaled to service contractors in Iraq and Afghanistan that they can escape financial

consequences for violations of their contracts and U.S. law. These errors warrant immediate review.

I. NO OTHER REMEDY EXISTS FOR THE ABUSES PETITIONERS SUFFERED

The United States committed to provide a remedy to victims of torture when it became a state party to the Convention Against Torture ("CAT") in 1990. Article 14(1) of CAT clearly states: "Each State Party *shall ensure* in its legal system that the victim of an act of torture *obtains redress* and has an *enforceable right to fair and adequate compensation* [. . .]" (emphasis added).[1]

Despite this commitment, no case brought on behalf of persons who have alleged that they have been tortured by U.S. actors, at U.S.-run detention facilities, or as a result of U.S. actions have been allowed to proceed to discovery or trial. The United States has opposed certiorari in every case brought by an alleged torture survivor, and the Supreme Court has not granted the writ. *See, e.g., El-Masri v. United States*, 552 U.S. 947 (2007); *Rasul v. Myers*, 130 S.Ct. 1013 (2009); *Arar v. Ashcroft*, 130 S.Ct. 3409 (2010);

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[1] *See* Brief of *Amici Curiae* Human Rights First, et al., at 5-8. Although that Article is not self-executing, it is well settled that "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118, 2 L.Ed. 208 (1804).

Mohamed v. Jeppesen Dataplan, Inc., No. 10-778, 2011 WL 1832889 (2011).

The United States devotes pages of its brief to a discussion of the United States' opposition to torture and the various ways it could theoretically hold torturers accountable for their actions. The United States says that Petitioners have "instead" or "additionally" turned to tort law for accountability or redress – implying that other remedies are available. This is not accurate.

The two primary tools for accountability the government puts forward – criminal prosecution and compensation under the Foreign Claims Act – are subject to the sole discretion of the Executive Branch. Since 2004, the United States has declined to exercise that discretion on the victims' behalf.

Former Secretary of Defense Donald Rumsfeld testified at a Joint Hearing of Congress in May 2004 about the Abu Ghraib torture scandal. He stated, "I am seeking a way to provide appropriate compensation to those detainees who suffered grievous and brutal abuse and cruelty . . . It is the right thing to do. I'm told we have the ability to do so. And so we will – one way or another." Donald H. Rumsfeld, *Testimony Before the Senate and House Armed Service Committees,* May 7, 2004.[2] Seven years after this

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[2] *Available at* http://www.defense.gov/speeches/speech.aspx?speechid=118.

promise was made, Petitioners – the victims of grievous, brutal cruelty at Abu Ghraib – have received *no* compensation or redress.[3] The military cannot document a single payment under the Foreign Claims Act for abuses that occurred at Abu Ghraib. *See* P. Yost, *No Amends Yet for Abu Ghraib Abuse Victims*, Associated Press, Sept. 26, 2010.[4]

The Foreign Claims Act (FCA) states that the Secretary of Defense "may" compensate friendly foreign nationals harmed by non-combat activities of the military; it creates no obligation to do so, and gives victims no legally enforceable rights. *See* 10 U.S.C. §2734. The FCA applies to claims for damage caused by members of the Armed Forces "or by a civilian employee of the military department concerned," but not to abuses by civilian contractors. *Id.* The military has denied Iraqis' FCA claims in cases where contractors committed violence against civilians. *See* Brief of *Amici Curiae* Human Rights First, et al., at 8-9. In one case, the Army denied an FCA

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[3] Petitioner Saleh was offered compensation of $5,000 by the Army for negligence in his detention rather than for the abuses he suffered. Because this offer was conditioned on signing a release that he feared would jeopardize his ability to pursue action against the Respondents, he declined. The other Petitioners have not been compensated at all. The Army has stated that 30 claims related to Abu Ghraib remain under investigation, *see* Yost, *supra*, but given the discretionary nature of the Foreign Claims Act and time that has already passed, the chances that the claimants will be compensated are slim to nil.

[4] *Available at* http://www.msnbc.msn.com/id/39367966/ns/world_news-mideast_n_africa/t/no-amends-yet-abu-ghraib-abuse-victims/.

claim filed by the widow of an Iraqi civilian killed by private military contractors because "the alleged damage was committed by US contractors. These private contractors are not qualified governmental employees . . . and as such, their acts are not within the scope of the Foreign Claims Act." *See* American Civil Liberties Union, Documents Received From the Department of the Army in Response to ACLU Freedom of Information Act Request at Bates No. 555-557 (released on Oct. 31, 2007), *available at* http://www.aclu.org/natsec/foia/pdf/Army0555_0557.pdf.

Prosecutorial decisions are likewise at the Executive's discretion, and the Executive has stated regarding the possibility of prosecutions for torture that "this is a time for reflection, not retribution . . . nothing will be gained by spending our time and energy laying blame for the past."[5]

Despite separate findings by Major General Antonio Taguba, Major General George Fay, and the U.S. Army Criminal Investigation Division (CID), that the Defendants' employees had likely violated federal law, and referrals for prosecution, the Government has declined to prosecute any civilian contractor for his or her role in torture at Abu Ghraib. Both the Army CID and the Department of

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[5] White House Press Release, Statement of President Barack Obama on Release of OLC Memos, Apr. 16, 2009, *available at* http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos/.

Justice have declined offers to interview Petitioners as potential witnesses.[6]

The non-criminal, non-FCA remedies that the United States cites have likewise proved ineffective. *See generally* Brief of *Amici Curiae* Retired Military Officers at 20-25. As the United States acknowledges, contractors were immune from actions in Iraqi courts until 2009. The "contractual remedies" alluded to in the United States' brief, U.S. Br. 9 (citing Department of Defense Section 1206 Public Law 108-375 Report 10-13 (2005) (hereinafter "DoD Report") have not been implemented in practice, in part because of the military's dependence on contractors to continue operations. *See* DoD Report 14 ("no known disciplinary actions were taken" against contractors or employees from May 1, 2003 to October 28, 2004). *See also* Congressional Research Service, Department of Defense Contractors in Afghanistan & Iraq: Background & Analysis, Mar. 29, 2011 (noting recent allegations that DoD does not know who is receiving U.S. contract funds in Afghanistan, allegations that money from U.S. contracts and subcontracts "has gone to local warlords and the Taliban" in Afghanistan, and criticism of DoD's "continued inability to accurately track contracts and contractor personnel."). Moreover,

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[6] *See* J. Phillips, *Inside the Detainee Abuse Task Force*, The Nation, May 13, 2011, *available at* http://www.thenation.com/article/160560/inside-detainee-abuse-task-force?page=full.

they do not directly address mistreatment of prisoners, and provide no remedy to third-party civilians.

The lack of an alternate remedy for victims of torture is not merely an equitable concern. It points to a major legal flaw in the court of appeals' preemption holding: the majority's decision to displace *all* tort law, state and federal, in the absence of any alternative regulatory scheme. *See* Pet. 24-37; Reply 15-16. As Judge Garland noted in his dissent below, in *Boyle*, the Court stated that "where the federal interest requires a uniform rule, the entire body of state law applicable to the area conflicts [with] *and is replaced by federal rules*." App. 72-73 (quoting *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 (1988)). The Supreme Court "does not normally preempt state law and simply leave the field vacant . . . Yet here, the court simply leaves the field." App. 73.

In contrast to *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001), no comprehensive federal scheme governs government contractors in this case. There are federal criminal laws that regulate contractors' treatment of prisoners, but there is no precedent for finding federal criminal laws to "occupy the field" and preclude tort liability. *See* App. 59, n. 10 (Garland, J., dissenting).

The Geneva Conventions, Army Regulations, and Field Manuals governing the treatment of prisoners apply to contractors as well as members of the military, and to the extent that they conflict with state tort law, preemption would be appropriate. But no

such conflict exists. Petitioners have never sought to subject corporations' treatment of prisoners to the laws of "fifty-one separate sovereigns," U.S. Br. at 14. They have simply sought a common law remedy for actions that clearly violate U.S. law. This Court has repeatedly recognized that state tort remedies may further federal standards of care. *See Silkwood v. Kerr-McGee*, 464 U.S. 238, 253 (1984); *Medtronic, Inc. v. Lohr*, 518 U.S. 496 (1996); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 519 (1992). Doing so in this case would have been consistent with the Department of Defense's recent affirmation that the existing system of tort liability is an appropriate mechanism to deter contractor misconduct. *See* Pet. 19-20, 35, 38; U.S. Br. 13-15. Instead, the court of appeals made a policy decision that "the very purposes of tort law are in conflict with the pursuit of warfare," and that torture victims had no legally enforceable remedies in any court, under any laws. It is no exaggeration to say that this decision immunizes contractors serving in war zones, and leaves torture victims without any form of redress.

II. THE UNITED STATES' STATEMENT THAT CONTRACTORS CANNOT BE COMBATANTS UNDERMINES THE MAJORITY'S RATIONALE FOR "BATTLE-FIELD" PREEMPTION

Despite opposing certiorari, the United States' Brief identifies serious errors in the majority's extension of *Boyle* through the combatant activities

exception. Specifically, the United States finds that the majority "misunderstood the circumscribed role of private contractors in war zones." U.S. Br. 15. The United States rightly affirms that contractors cannot participate in combat:

> Under domestic and international law, civilian contractors engaged in authorized activity are not "combatants"; they are "civilians accompanying the force" and, as such, cannot lawfully engage in "combat functions" or "combat operations."[7]

Id.

This undermines the entire premise of the majority's "battle-field preemption" test, summarized by United States as applying "(1) '[d]uring wartime,' (2) 'where a private service contractor is integrated,' (3) 'into combatant activities,' (4) 'over which the military retains command authority,' (5) unless the contractor is providing services in 'such a discrete manner' that they 'could be judged separate and apart from combat activities of the U.S. military.'" U.S. Br. 18. If contractors cannot be integrated into combatant activities over which the military retains command authority, then it is inappropriate to use the combatant activities exceptions to FTCA preempt

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[7] Contrary to the majority's claim, which the U.S. relies upon, U.S. Br. 18, citing App. 13, Petitioners have consistently challenged the characterization of the detention of civilian detainees as a "combatant activity." *See, e.g.*, Pet. 32.

tort claims against them for conduct outside the scope of their contract.

The United States notes the majority's failure to address whether application of the preemption defense is appropriate if the contractor acts outside of the scope of their employment or contract. The United States finds the majority did not "address the contours of either such limitation." U.S. Br. 16. This omission is not minor. Rather, it reflects the omission of the entire test set out in *Boyle*, 487 U.S. at 512, and allows for immunity for independent and unapproved acts of the contractor, in violation of *Boyle*.

Given these legal errors, and the importance of providing a remedy for torture, Petitioners respectfully but strongly disagree with the United States position that review is not warranted "at this time." U.S. Br. 7. The United States speculates that future cases "could" result in the necessary "refinement and clarification of the scope and meaning of the court's holding." *Id.* Leaving aside the obvious impact of non-review on the Petitioners – who include the majority of Abu Ghraib victims seeking relief in U.S. courts – that is unlikely. Because government contractor defendants have argued for dismissal on so many separate legal grounds, "further percolation" of cases involving preemption of state claims are unlikely to surface precisely the same issues as those presented in this case. A hypothetical opportunity to review a decision that the United States recognizes is fundamentally flawed should not outweigh the pressing

need for this Court to clearly articulate the parameters of preemption in this area.

However, should the Court not grant a writ of certiorari, and decide instead to wait for another Circuit to apply the Federal Tort Claims Act's combatant activities exception to corporate government contractors before addressing the error presented in this case,[8] Petitioners respectfully urge the Court to summarily reverse and remand based on the clear errors identified by the United States and detailed by the Petitioners in their briefing.

Respectfully submitted,

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[8] Petitioners are aware of only one pending appeal which raises the government contractor-preemption questions at issue in this case, *Al Shimari v. CACI Premier Tech., Inc.*, 657 F. Supp. 2d 700 (E.D. Va. 2009) (denying contractor's motion to dismiss state-law tort claims), appeal pending, No. 09-1335 (4th Cir.); *Al-Qurasihi v. Nakhla*, 728 F. Supp. 2d 702 (D. Md. 2010) (same), appeal pending, No. 10-1921 (4th Cir.). The court of appeals in the Fourth Circuit is holding these cases in abeyance pending resolution of this petition, and any future guidance from the Court in this area.

No. 09-1313

JUL 13 2010

In The

Supreme Court of the United States

HAIDAR MUHSIN SALEH, et al.,

Petitioners,

v.

TITAN CORPORATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

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This case warrants review because it creates a circuit split regarding the application of the Alien Tort Statute (ATS) to non-state actors for war crimes. Respondents' attempts to obscure that circuit split by claiming that Petitioners have not previously alleged war crimes are disingenuous. Petitioners are civilian detainees protected by the Geneva Conventions, and have consistently maintained throughout this litigation that they are victims of war crimes, including torture, for which the corporate defendants bear responsibility.

Furthermore, Respondents' submissions that this case challenges Executive "war making" powers or governmental policies regarding the use of contractors is simply inaccurate: this is a case about the commission of war crimes by private actors who violated state, federal and international law. Because of the far-reaching effects of the majority's "battlefield preemption" at a time when contractors outnumber the military participating in overseas operations, this case requires the Supreme Court's immediate attention.

I. THE MAJORITY'S DECISION CREATES A GENUINE CIRCUIT SPLIT AS TO NON-STATE ACTORS' ATS LIABILITY FOR THE WAR CRIME OF TORTURE

Respondents' claim that the majority's ATS holding does not create a genuine circuit split is erroneous,

and rests on an inaccurate characterization of the record below. First, the district court's dismissal of Petitioners' ATS claims rested solely on Respondents' status as non-state actors, and the majority affirmed both the district court's judgment and its rationale. The fact that the majority advanced additional, alternative justifications for its dismissal of the Petitioners' ATS claims does not convert this holding into dicta. Second, Respondents' claim that the Petitioners forfeited their claim that non-state actors are liable for war crimes by failing to preserve it on appeal is flatly inaccurate. Third, the majority's alternative rationales for rejecting Petitioners' ATS claims present no obstacle to review of the first question presented, because they are clearly in error, and warrant summary reversal.

A. The Court of Appeals' Affirmance of the District Court's Rationale for Dismissal of the Petitioners' ATS Claims Is Binding Precedent, Not Mere Dicta

The Court of Appeals held that private actors' torture of civilian prisoners detained in the course of an armed conflict was not actionable under the ATS, 28 U.S.C. §1350, because "[a]lthough torture committed by a state is recognized as a violation of a settled international norm, that cannot be said of private actors." App. 34. Respondents attempt to characterize this holding as dicta. That attempt fails. The majority's ruling that non-state actors are not liable under the ATS for the war crime of torture affirmed both the judgment and rationale of the

district court, and is binding precedent in the D.C. Circuit.

The district court acknowledged that Petitioners had properly alleged torture and war crimes in their complaints. App. 107 (Petitioners "bring allegations of nearly unspeakable acts of torture"); App. 114 ("The complaint asserts Alien Tort Statute claims for . . . war crimes"); App. 119. It nonetheless dismissed their Alien Tort Statute claims because it found that "the question is whether the law of nations applies to *private actors* like the defendants in the present case. . . . in the D.C. Circuit the answer is no." App. 22. The majority affirmed both the district court's judgment and its reasoning, acknowledging that "whether a private actor, as opposed to a state, could be liable under the ATS" is an "issue which divides us from the Second Circuit." App. 31.

The fact that the majority made additional, alternative holdings justifying dismissal of the Petitioners' ATS claims do not convert this affirmance into dicta, as lower courts in the District of Columbia Circuit have already confirmed. In February 2010, a federal district judge dismissed an ATS war crimes claim on the basis of the majority's decision, holding that although "[p]laintiffs have alleged sufficient facts to establish that Defendants have allegedly committed war crimes in violation of the law of nations," their ATS claims were not actionable because the defendant "is not a state actor." *Estate of Manook v. Resources Triangle Inc., Int'l*, 693 F.Supp.2d 4, 19 (D.D.C. 2010).

B. Petitioners' Appellate Briefs Argued Against Dismissal of Their ATS Claims on the Same Grounds as Their Petition

Respondents claim that Petitioners forfeited their argument that private actors' war crimes are actionable under the law of nations, because they did not preserve it in the Court of Appeals. Titan Opp. 9. This is simply false. In their opening brief below, Petitioners listed the following issue presented for review: "Did the District Court err in holding that torture and war crimes by corporate employees are not actionable under the Alien Tort Statute?" Petitioners' Opening Appellate Br., *Saleh v. Titan Corp.*, No. 08-7008. *See also id.* at 19 (citing allegation in government report that a Titan employee had raped a prisoner), *id.* at 39 (stating that Titan was legally required to "discipline and supervise its employees to prevent them from committing war crimes."); *id.* at 63 ("This Court should follow the lead of the Supreme Court, look to the well-developed consensus in both domestic and international law, and hold that Plaintiffs may state ATS claims against [Titan] for war crimes"); Petitioners' Reply Br. 6, n.2, *Saleh v. Titan Corp.*, No. 08-7008 (citing to Titan translator Adel Nakhla's confession to acts that U.S. law defines as war crimes); *id.* at 18 (referring to Plaintiffs' "allegations of torture, war crimes and assault and battery"); *id.* at 24 (arguing that "private actors can be held liable for serious violations of international law, such as the claims for war crimes of the type alleged by Plaintiffs."); *id.* at 24 (noting that "torture *is* a war

crime"); *id.* at 27 (arguing that Titan should be held liable for violation of "*Sosa*-level norms, such as the prohibition against war crimes and torture."); *id.* at 28 ("At this early stage in the litigation, this Court must look to Plaintiffs' Complaint, which pled widespread rape, cruel treatment, forced nudity and murder. The Complaint properly pled war crimes"); Arg. Tr. 30, *Saleh v. Titan Corp.*, No. 08-7008 (D.C. Cir. Feb. 10, 2009) (Petitioners' counsel states that the "ATS claim that has that level of concreteness that *Sosa* requires is the war crimes claim."); Arg. Tr. 29, *Saleh v. CACI Int'l, Inc.*, No. 08-7001 (D.C. Cir. Feb. 10, 2009) (Petitioners' counsel states that "if you look at the conduct that's alleged for each individual [plaintiff], every individual was subjected to a level of physical force that rose to the level of torture.").

Petitioners' counsel did state during oral argument that abuse against prisoners violated the law of nations even if it did not rise to the level of torture, because "the Geneva Convention [states] that you're not to use any physical force" against civilian prisoners. Arg. Tr. 29, *Saleh v. CACI Int'l, Inc.*, No. 08-7001 (D.C. Cir. Feb. 10, 2009). But this statement – which was made during oral arguments in CACI's appeal,[1]

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[1] Petitioners did not file a notice of cross-appeal regarding CACI's ATS liability for war crimes, because there was no order or final judgment of the district court that they had the right to appeal. CACI's appeal was a challenge to the district court's November 6, 2007 interlocutory order (App. 84-106) denying summary judgment to CACI, pursuant to 28 U.S.C. §1292(b). The November 6th order did not discuss the Petitioners' ATS

(Continued on following page)

not the Petitioners' appeal of the district court's ATS holding – was *not* a request for the lower court to recognize a new cause of action for assault and battery under the ATS. Rather, it was an argument that that there was no conflict between the Respondents' state and federal legal duties. In response to the Court's inquiry whether "assault and battery would be covered by the law of nations," counsel confirmed that "[i]n this context it would be," *id.* at

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claims, which the district court had dismissed in two previous interlocutory orders. App. 107-138. Because of this, CACI moved to intervene in the Petitioners' appeal of the district court's judgment regarding Titan, on grounds that "CACI remains a defendant in the *Ibrahim* and *Saleh* lawsuits, and CACI will be bound by this Court's resolution of these appeals to the extent this Court's ruling addresses the legal sufficiency of Plaintiffs' Alien Tort Statute claims." CACI Mot. to Intervene, *Saleh v. Titan Corp.*, No. 08-7008 (Mar. 28, 2008). The Court of Appeals granted CACI's motion on June 13, 2008. Because of this, Petitioners briefed the issue of corporate liability for war crimes solely in the Titan appeal, but made clear during briefing and oral argument that CACI had also committed the war crime of torture. *See* Petitioners' Appellate Br. 17, 39-40, *Saleh v. CACI Int'l, Inc.*, No. 08-7001; Petitioners' Opening Appellate Br. 17, n.5, *Saleh v. Titan Corp.*, No. 08-7008 (citing evidence that "CACI interrogators Steven Stefanowicz and Daniel Johnson were two of the ringleaders of prisoner torture at Abu Ghraib"). Given the majority's acknowledgement that Petitioners' allegation "that one of *CACI*'s employees observed and encouraged beating of a detainee's soles with a rubber hose, which could well constitute torture or a war crime," App. 5, n.1 (emphasis in original), its failure to remand to the district court on the issue of CACI's liability for war crimes underscores its adoption of the district court's conclusion regarding non-state actors' ATS liability.

30, because it violated the duty imposed by federal common law and the Geneva Conventions

> not to inflict physical harm on the detainees. And this really goes to the point of the duty of care and why the argument made by CACI that the combatant activities exception eliminates any duty of care is not accurate because when we're looking under federal common law . . . the federal common law incorporating the law of war, the law of war does not eliminate a duty of care. The law of war does the opposite, it makes specific when there are duties of care. And one of the places in which there is a duty of care is when people are detained, they're no longer out in the battlefield.

Id. at 31.

This statement, far from being "absurd" or "untenable," App. 33, is plainly accurate. The Army has acknowledged that prisoners at Abu Ghraib were protected persons under the Fourth Geneva Convention. *Titan* J.A. 529-530. Article 27 of that treaty requires that protected persons "be humanely treated, and . . . protected especially against all acts of violence or threats thereof." App. 156. Article 32 forbids signatories from "taking any measure . . . to cause the physical suffering" of protected persons in captivity, including "corporal punishments" and "any other measures of brutality whether applied by civilian or military agents." App. 157. Article 37 states that protected persons who are detained must

"during their confinement be humanely treated." App. 157. Article 147 defines "grave breaches" of the Convention to include not only torture and murder, but also "inhuman treatment," and "willfully causing great suffering or serious injury to body or to health." App. 159. *See also* U.S. Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, §1-5(a)(4) (Oct. 1, 1997) (App. 160-161) (military regulations implementing the Geneva Conventions state that inhumane treatment of detainees "is a serious and punishable violation under international law . . . "); *id.* at §1-5(b) (prohibiting "corporal punishment" and "all cruel and degrading treatment" of prisoners); *id.* at §1-5(c) (prisoners "will be protected against *all acts of violence* to include rape, forced prostitution, *assault* and theft, insults, public curiosity, *bodily injury*, and reprisals of any kind") (emphasis added).

Grave breaches of the Geneva Conventions are war crimes under United States and international law. *See* 18 U.S.C. §2441(c)(1). The Petitioners' complaints alleged such grave breaches. Petitioners asked the Court of Appeals to reverse the district court's dismissal of their ATS claims for the war crime of torture, which violates a specific, universal, and obligatory international law norm. As Petitioners argued below, private parties' liability for war crimes, including torture, has been recognized by the Second and Eleventh Circuits, by numerous international law sources starting with the Nuremberg tribunals, and recently confirmed by the United States' Congress and Executive Branch. The Court of Appeals' contrary holding warrants a grant of *certiorari*.

C. The Court of Appeals' Alternate Rationales for Dismissal of the Petitioners' ATS Claims Warrant Summary Reversal.

The majority's alternative grounds for dismissing Petitioners' ATS claims are so clearly in error as to warrant summary reversal, and thus present no obstacle to reaching Petitioners' first question presented.

1. The Court of Appeals Erred in Refusing to Credit the Allegations in the Petitioners' Complaint.

The Third Amended Complaint in and the Second Amended Complaint in *Ibrahim* allege specific acts of brutality that rise to the level of torture, and properly state causes of action for torture and war crimes. Pet. 6-7. The majority, however, held that it was not required to credit these allegations, because,

> after discovery and the summary judgment proceeding, for whatever reason, plaintiffs did not refer to those allegations in their briefs on appeal. Indeed, no accusation of "torture" or specific "war crimes" is made against Titan interpreters in the briefs before us. We are entitled, therefore to take the plaintiffs' cases as they present them to us.

App. 4. As noted above in Section I(B), this is not an accurate characterization of the Petitioners' briefs.

Moreover, the majority disregarded the fact that the district court limited both discovery and summary

judgment briefing to the issue of preemption. There has been no discovery on the merits of Petitioners' allegations. App. 38, 44, 115-16, 133-35. This Court has held that summary judgment is not appropriate unless the plaintiff has "a full opportunity to conduct discovery" on the issues in question. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (summary judgment appropriate only "after adequate time for discovery"). *See also Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993); *Gibson v. City of Chicago*, 910 F.2d 1510, 1520-21 (7th Cir. 1990) (before plaintiffs were permitted to take discovery on an issue, court was required to "accept as true all the plaintiff's well-pleaded factual allegations and the inferences reasonably drawn from them."); *First Chicago Int'l v. United Exch. Co.*, 836 F.2d 1375, 1376 (D.C. Cir. 1988); *Robison v. Canterbury Village, Inc.*, 848 F.2d 424, 426, 429 (3d Cir. 1988); *Chipanno v. Champion Int'l Corp.*, 702 F.2d 827, 831 n.2 (9th Cir. 1983).

In line with these precedents, and the limitations it placed on discovery, the district court has not made any factual findings regarding the merits of plaintiffs' allegations of torture and war crimes. An appellate court has no authority to act as an initial fact finder. *See, e.g., United States v. Hill*, 131 F.3d 1056, 1061 (D.C. Cir. 1997) (noting that "where the correctness of the lower court's decision depends upon a determination of fact which only a [fact-finder] could make but which has not been made, the appellate court cannot take the place of the [fact-finder]") (internal quotations and citations deleted). *See also SEC v. Chenery Corp.*,

318 U.S. 80, 88 (1943) (same). This Court should summarily reverse the majority's attempt to "usurp the function of the duly constituted fact finder," *Dolliver v. United States*, 379 F.2d 307, 308 n.1 (9th Cir. 1967).

2. The Court of Appeals Erred in Holding that its Judicially Created "Battle-field Preemption" Defense Bars ATS Claims Arising Under Federal Common Law

The lower court's holding that if "state tort law is preempted on the battlefield because it runs counter to federal interests, the application of international law to support a tort action on the battlefield must be equally barred," App. 37, conflicts with this Court's decisions, and has no basis in precedent or statute. In support of its argument, the majority cited only one inapposite case, *Chamber of Commerce of U.S. v. Reich,* 74 F.3d 1322 (D.C. Cir. 1996), in which the D.C. Circuit held that a federal statute (the National Labor Relations Act) preempted an Executive Order on federal procurement policy. App. 37. A precedent holding that a federal statute is *lex superior* to an executive order does not support the Court of Appeals' holding that its newly-created common law defense of "battle-field" preemption is *lex superior* to the long line of precedents affirming that federal common law incorporates the law of nations. *See* Brief of *Amici Curiae* Professors of Federal Courts, International Law, and U.S. Foreign Relations Law at 10-15. *See*

also Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004) ("[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations"); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (noting that "it is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances"); *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination"); *The Nereide*, 9 Cranch 388, 423, 3 L.Ed. 769 (1815) (Marshall, C.J.) ("[T]he Court is bound by the law of nations which is a part of the law of the land"). *See also Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118, 2 L.Ed. 208 (1804) ("'[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains.").[2]

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[2] CACI's claim that "the Constitution itself, by assigning war powers exclusively to the political branches, occupies the field and precludes judicial review," of U.S. contractors' wartime conduct is an argument for a finding of nonjusticiability under the political question doctrine, not a preemption defense. CACI Opp. 9, n.5. CACI argued before the both the district court and the Court of Appeals that this case presents a political question, but the district court rejected that claim (App. 109, 124-128) and the Court of Appeals did not reach it.

II. THE MAJORITY'S "BATTLE-FIELD" PREEMPTION HOLDING WARRANTS IMMEDIATE REVIEW

Respondents cite the United States' *amicus* brief opposing *certiorari* in *Carmichael v. Kellogg, Brown & Root Svcs., Inc.*, No. 09-683 (May 28, 2010) to argue that the Court should allow the majority's preemption holding to stand while the issue of military service contractors' tort liability "percolates" in the lower courts. But the Court of Appeals' holding in this case sweeps far broader than the Eleventh Circuit's holding in *Carmichael*, 572 F.3d 1271 (11th Cir. 2009), and warrants immediate review under the standards set forth in Supreme Court Rule 10. The majority held that the Federal Tort Claims Act's combatant activities exception, and the federal government's power over foreign affairs, preempted the *entire body of tort law* from applying to private, for-profit military contractors in Iraq and Afghanistan. Given the conflict between the majority's decision and this courts' preemption jurisprudence, and the harmful policy implications of allowing contractors to violate the laws of war with impunity, further percolation is both unnecessary and inappropriate.

In *Carmichael*, the Eleventh Circuit applied the well established *Baker v. Carr*, 369 U.S. 186 (1962), analysis to determine whether a plaintiff's claims presented a nonjusticiable political question to the facts concerning a military fuel supply convoy accident in Iraq. *See* U.S. Br. at 16, *Carmichael*, *supra*. Based on the district court's factual findings that the convoy

was led by a military officer, and the military had determined the convoy's exact route, departure time, the amount of supplies to be transported, the speed at which vehicles would travel, the security measures taken, and the space maintained between vehicles, the Court of Appeals found that it could not evaluate the Plaintiff's negligence claims without examining sensitive military judgments, which the Constitution had textually committed to the Executive Branch. *Id.* at 2-7. The *Carmichael* court further found that there were no judicially manageable standards to resolve the plaintiff's negligence claim, because a trial court would be forced to ask "what a reasonable driver subject to military control over his exact speed and path would have done," and would have to take into account the fact that "any decision to slow down could well have jeopardized the entire military mission and could have made Irvine and other vehicles in the convoy more vulnerable to an insurgent attack." *Id.* at 7. The Solicitor General stated that the Court of Appeals "may have ultimately erred" in applying the *Baker v. Carr* factors "to the particular facts of this case," *id.* at 16, but nonetheless opposed *certiorari*.

In this case, the Court of Appeals did not merely misapply a properly stated rule of law, or make erroneous factual findings. Instead, the majority created an entirely new doctrine of government contractor preemption, "to coin a term, 'battle-field preemption,'" App. 16, based on the combatant activities exception to the Federal Tort Claims Act. The majority held that FTCA preempted all tort suits

against service contractors "integrated and performing a common mission with the military," App. 13, in combat zones, because

> the policy embodied by the combatant activities exception is simply the elimination of tort from the battlefield. . . . And the policies of the combatant activities exception are equally implicated whether the alleged tortfeasor is a soldier or a contractor.

App. 115.

As Judge Garland explained in his well-reasoned dissent (App. 38-83), this doctrine is not merely "novel"; it also conflicts with binding Supreme Court precedents on the scope of government contractor preemption, and on the proper analysis of whether a federal statute preempts generally applicable state tort law. In holding that the combatant activities exception preempted "the imposition per se" of tort liability, the majority abandoned the requirement of *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507-509 (1992) and *Correctional Svcs. v. Malesko*, 534 U.S. 61, 74 n.6 (2001), of a direct conflict between a contractor's federal and tort law duties. The assertion that "the policies of the combatant activities exception are equally implicated whether the alleged tortfeasor is a soldier or a contractor" disregards the text of the FTCA, and *Wyeth v. Levine's* holding that state law is not to be superseded "unless that was the clear and manifest purpose of Congress." 129 S. Ct. 1187, 1194-1195 (2009) (quoting *Medtronic, Inc. v.*

Lohr, 518 U.S. 470, 485 (1996)). *See also* Pet. 26-32; *Richardson v. McKnight*, 521 U.S. 399, 403-404 (1997) (private actors do not automatically receive governmental immunity, and "private prison guards, unlike those who work directly for the government, do not enjoy immunity from suit" for violating prisoners' civil rights); *Wyatt v. Cole*, 504 U.S. 158 (1992) (conspiracy with government officials does not confer government immunities). The majority's alternative holding, that Petitioners' claims are preempted by the federal government's foreign affairs power, is equally unsupported by precedent. Pet. 33-37.

Further percolation in the Courts of Appeals will not resolve this conflict, and the grave and harmful policy implications of the majority's decision counsel against letting it stand. As the United States stated in its amicus brief in *Carmichael*, the U.S. government

> has significant interests in ensuring that its contractors exercise proper care in minimizing risks to service members and civilians and do not avoid appropriate sanctions for misconduct. Contractor misconduct resulting in harm to local nationals abroad also in some circumstances can have significant negative foreign policy implications for the United States.

U.S. Br. at 9, *Carmichael*, *supra*. *See also* Brief of *Amici Curiae* Human Rights First et al. at 21, quoting U.S. DEP'T OF THE ARMY, UNITED STATES ARMY COUNTERINSURGENCY HANDBOOK 1-24,

¶ 1-132 (2006) (Participants in counterinsurgency operations "must follow United States law, including domestic laws, treaties to which the United States is a party, and certain [host nation] laws. Any human rights abuses or legal violations committed by U.S. forces quickly become known throughout the local populace and eventually around the world. Illegitimate actions undermine both long- and short-term [counterinsurgency] efforts"); App. 173 (Department of Defense affirms "the current rule of law . . . holding contractors accountable for the negligent or willful actions of their employees, officers, and subcontractors," and declines to "invite courts to shift the risk of loss to innocent third parties" through "defenses based on the sovereignty of the United States" for the contractor's "own actions.").[3]

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[3] Respondents' claim that the Solicitor General's brief in *Carmichael* disavowed DoD's regulatory comments is incorrect. The Solicitor General's brief noted that the DoD comments supported "holding contractors accountable for the negligent or willful actions of their employees, officers, and subcontractors," and suggested that courts should not permit contractors to invoke the United States' sovereignty to avoid liability for their "own actions." U.S. Br. at 12, n.4, *Carmichael*, *supra*. It also noted DoD's statement that "[c]ontractors will still be able to defend themselves when injuries *to* third parties are caused by the actions or decisions of the Government," and stated that the regulatory comments took no position as to liability in cases like *Carmichael*, where there is genuine ambiguity as to whether the military's or contractor's conduct caused the plaintiffs' injuries. *Id.* In this case, however, there is no such ambiguity. Petitioners allege conduct that violates federal law, the laws of war, and U.S. policy, and Respondents have never produced evidence that

(Continued on following page)

To be sure, this interest must be balanced against competing governmental interests. *See* U.S. Br. at 9, *Carmichael*, *supra*. But there is no justification for disregarding it entirely. This is particularly true in a case that arises out of the torture of prisoners at Abu Ghraib, which *amici* Retired Military Officers describe as "one of the most shameful episodes in our Nation's otherwise honorable military history – an episode that damaged our country's hard-earned reputation for lawful and humane treatment of wartime detainees." Brief of *Amici Curiae* Retired Military Officers at 4.

As the officers state, "[a]bsent traditional tort liability, there is not a meaningful mechanism to hold accountable those who engage in patently unlawful conduct or to deter private military contractors from abusing prisoners in the future." *Id.* at 21. Although criminal prosecution and contractual remedies for contractor misconduct are theoretically available, U.S. Br. at 14, n.7, *Carmichael*, *supra*, there are substantial legal and practical obstacles to federal prosecution of contractors who commit felonies. *Id.* at 22-23. Moreover, "absent the coercive effect of tort liability, private military contractors have little incentive to prevent future abuses by their employees," because "[c]orporations may shift responsibility to individual employees and claim that they have fulfilled their legal obligations by firing them." *Id.* at 23.

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the military ordered or authorized its employees' torture of prisoners.

Corporate actors do have contractual duties to the government, but they are "primarily accountable to private shareholders," *id.* at 15, and the federal government has had difficulty enforcing contractual remedies even against corporations that serially violate United States criminal law. *See, e.g., Blackwater Deal in Afghanistan Questioned by Congress*, The Guardian, Jun. 28, 2010; *Blackwater Likely to Face No Sanctions*, McClatchy Newspapers, June 28, 2010 (recent news articles describe recent award of new security contracts worth $220 million to Xe Services, Inc., despite its employees' multiple massacres of unarmed civilians and the recent indictment of its former President and four other high ranking executives on weapons smuggling charges).

There are 217,832 contractor personnel providing services to the United States in Iraq and Afghanistan, answering not to the military chain of command but to for-profit corporations who receive a total of over $5 billion annually for their services. Pet. at 20-21. The majority's holding has "eviscerated" one of the most effective means of deterring them from violating the law, Brief of *Amici Curiae* Retired Military Officers at 25, and is contrary to Supreme Court precedent, the text of the relevant statute, and the stated policy interests of the Executive branch. The liability of military service contractors for common law torts and for war crimes is clearly an issue of national importance. Further percolation in the lower courts may be helpful in cases that turn on a factual dispute as to whether the military or a

contractor caused a plaintiff's injury, or how to precisely apply the *Boyle* preemption test, the political doctrine, and other relevant defenses to the facts of cases arising in combat zones. But the majority's opinion presents the threshold question of whether military contractors providing services in war zones can *ever* be held civilly liable for their tortious conduct, or if all such suits are preempted because the combatant activities exception to FTCA's waiver of sovereign immunity demonstrates that "the very purposes of tort law are in conflict with the pursuit of warfare." App. 16. The answer to that question will have serious implications not only for the torture victims in this case, but for U.S. foreign policy, and for thousands of U.S. soldiers and innocent civilians who have been or may be gravely injured by military contractors' misconduct. Because of the breadth of the majority's holding, this case is an unusually strong vehicle for resolving that question, and warrants immediate review by this Court.

Respectfully submitted,

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No. 09-1313

In the Supreme Court of the United States

HAIDAR MUHSIN SALEH, ET AL., PETITIONERS

v.

TITAN CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether state-law tort claims brought against civilian contractors arising from alleged abuse and mistreatment sustained by Iraqi nationals detained at the Abu Ghraib prison complex in Iraq are preempted by federal law.

2. Whether claims of torture and other war crimes can be brought against private actors under the Alien Tort Statute, 28 U.S.C. 1350.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Petitioners are Iraqi nationals previously detained by the United States military at the Abu Ghraib prison complex in Iraq (as well as family members of detainees). They filed two separate suits against respondents, who are civilian contractors that provided interrogation (CACI) and translation (Titan) services to the military during the war in Iraq. As relevant here, petitioners asserted claims under state tort law and federal common law based on the Alien Tort Statute (ATS), 28 U.S.C. 1350, alleging that they were beaten, raped, electrocuted, deprived of food and sleep, threatened by dogs,

shackled in stressful positions, stripped, exposed to extreme heat and cold, and abused sexually and in other ways by respondents' employees. Pet. App. 2-3, 84-85, 107-109, 118-119.

2. The district court dismissed petitioners' claims based on the ATS, relying on circuit precedent to find no consensus that private acts of torture violate the law of nations. Pet. App. 109-111, 122-124. The court determined, however, that it did not have a sufficient evidentiary basis to evaluate whether, as respondents argued, petitioners' state-law claims were preempted by federal law. The court accordingly ordered limited discovery. *Id* at 115-116, 128-135.

Subsequently, on motions for summary judgment, the district court applied the analysis set forth in *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988), to evaluate respondents' preemption defense. Pet. App. 86-105. In *Boyle*, this Court held that state common-law tort claims against a military contractor based on the design of equipment manufactured according to military specifications were preempted because the claims significantly conflicted with the "'uniquely federal' interest" in the procurement of equipment by the United States. 487 U.S. at 505-506. The Court looked to the discretionary function exception in the Federal Tort Claims Act (FTCA), 28 U.S.C. 2680(a), to inform the scope of the defense. 487 U.S. at 511-513.

Here, the district court determined that "the treatment of prisoners during wartime undoubtedly implicates uniquely federal interests." Pet. App. 87. In assessing "whether the application of state tort law would produce a 'significant conflict' with federal policies or interests," *id.* at 86 (quoting *Boyle*, 487 U.S. at 507), the court focused on "the federal interests embod-

ied in the FTCA's combatant activities exception, which bars suit against the federal government for '[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war,'" *id.* at 87 (quoting 28 U.S.C. 2680(j)) (brackets in original). The court held that petitioners' state-law claims would be preempted if respondents' employees were engaged in "activities both necessary to and in direct connection with actual hostilities," *id.* at 88 (citation omitted), and "were acting under the direct command and exclusive operational control of the military chain of command," *ibid.*

The district court held that respondents' employees satisfied the first requirement. Pet. App. 101, 104. But the court concluded that, while Titan's employees "were fully integrated into the military units to which they were assigned" and "performed their duties under the direct command and exclusive operational control of military personnel," *id.* at 103, CACI's employees "were subject to a dual chain of command, with significant independent authority retained by CACI supervisors," *id.* at 104-105. The court accordingly granted summary judgment in favor of Titan but denied CACI's motion. *Id.* at 105-106.

3. CACI filed an interlocutory appeal under 28 U.S.C. 1292(b) and petitioners appealed the final judgment in favor of Titan. The court of appeals held that petitioners' state-law claims were preempted as to both Titan and CACI, and that the district court had properly dismissed the ATS claims against Titan. Pet. App. 1-83.[1]

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[1] The ATS claims against CACI were also dismissed but were not at issue on appeal. Pet. App. 8.

a. Like the district court, the court of appeals relied on this Court's reasoning in *Boyle* and the FTCA's combatant activities exception to analyze respondents' preemption defense. Finding it undisputed that "uniquely federal interests are implicated in these cases," the court identified the key question as "whether a significant conflict exists between [those] federal interests" and state tort law. Pet. App. 13-14.

Here, the court of appeals noted, petitioners did not dispute either that "the detention of enemy combatants" is "included within the phrase 'combat activities'" for purposes of the FTCA's combatant activities exception, or that respondents' employees were "integrated and performing a common mission with the military under ultimate military command." Pet. App. 13. The court concluded that petitioners' invocation of state-law tort concepts in these circumstances conflicted with the policy underlying the combatant activities exception, namely, to "eliminat[e] tort from the battlefield, both to preempt state or foreign regulation of federal wartime conduct and to free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit." *Id.* at 15. That policy, the court reasoned, is "equally implicated whether the alleged tortfeasor is a soldier or a contractor engaging in combatant activities at the behest of the military and under the military's control." *Ibid.*

The court of appeals also concluded that "specific conflicts" would arise if state tort suits were permitted. Pet. App. 16. For example, litigation costs would be passed through to the government, and military personnel could be "haled into lengthy and distracting court or deposition proceedings" that would often "devolve into an exercise in finger-pointing between the defendant

contractor and the military, requiring extensive judicial probing of the government's wartime policies." *Ibid* The court also noted that preemption of petitioners' state-law claims would not "leave[] the field without any law at all," since "numerous criminal and contractual enforcement options" are available "to punish and deter misconduct by" government contractors, as well as to compensate victims. *Id.* at 17 (citing Foreign Claims Act (FCA), 10 U.S.C. 2734).

In describing the contours of the preemption defense, the court of appeals held that "[d]uring wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted." Pet. App. 19. The court recognized, however, that "even in a battlefield context," "a service contractor might be supplying services in such a discrete manner * * * that those services could be judged separate and apart from combat activities of the U.S. military." *Id* at 19-20.[2]

b. With respect to the ATS claims against Titan, the court of appeals regarded petitioners' "factual allegations" on appeal as primarily limited to claims of "abuse" or "harm." Pet. App 4. The court rejected as "untenable" the contention that every abuse by private actors "is condemned by a settled consensus of international law." *Id.* at 33. The court then considered, "*arguendo*," whether petitioners' claims could be sustained if they "had adequately alleged torture (or war crimes)." *Id.* at 34. The court concluded that "[a]lthough torture com-

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[2] The court of appeals further held petitioners' claims preempted because the application of state tort law in this context would conflict more generally with federal war powers and foreign policy interests. Pet. App. 25-28.

mitted by a state is recognized as a violation of a settled international norm, that cannot be said of private actors." *Ibid* (citing *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 206-207 (D.C. Cir. 1985)). The court acknowledged that "war crimes" may have a "broader reach," but declined to decide that issue because, as the court described the proceedings, petitioners had not made such allegations and, "[p]resumably for this reason," the district court "analyzed only an asserted international law norm against torture, not war crimes." *Id.* at 34 n.13.

c. Judge Garland dissented from the court's preemption holding. Pet. App. 38-83; *id.* at 82 n.30 (declining to address ATS claims). Although he agreed with the majority that this case involves "uniquely federal interests," *id* at 48-49 (citation omitted), he believed that the court "should hesitate to extend *Boyle* beyond the scope of the discretionary function exception and direct-conflict rationale that the Court relied upon in that case," *id.* at 48. Acknowledging, however, that the majority's arguments in reliance on the combatant activities exception did not "lack weight," *id.* at 74, Judge Garland would have required at a minimum that the contractor have acted "under the military's control" to support invocation of a preemption defense. *Id.* at 75. Because, in his view of the existing regulatory regime, a civilian contractor is never within the military chain of command, Judge Garland concluded that the contractor's actions can never be preempted as "the combatant activities of the military or naval forces." *Id.* at 75-78 (emphasis omitted).

DISCUSSION

Relying on *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988), and drawing on the FTCA's combatant activities exception, the court of appeals concluded that certain state-law tort claims against government contractors retained in connection with the military's combatant activities abroad are preempted. The court's holding is unclear and imprecise and, depending on how it is read, potentially misguided in certain respects. Nonetheless, this Court's review is not warranted at this time. There is no conflict among the circuits with respect to the preemption issue addressed by the court of appeals, and further explication in future cases could result in refinement and clarification of the scope and meaning of the court's holding. Indeed, further percolation of the full array of defenses implicated in this complex and developing area of the law is as warranted today as it was when this Court denied review last Term in *Carmichael* v. *Kellogg, Brown & Root Service, Inc.*, 130 S. Ct. 3499 (2010). Review of the ATS claims is also unwarranted because the question on which petitioners seek certiorari is not squarely presented and there is no circuit conflict.

1. The United States Government unequivocally opposes torture and has repudiated it in the strongest terms. Federal law makes it a criminal offense to engage in, attempt to commit, or conspire to commit torture outside the United States. 18 U.S.C. 2340A. Congress and the President have unambiguously declared that the United States shall not engage in torture or inhuman treatment. *E.g.*, 42 U.S.C. 2000dd ("No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or

degrading treatment or punishment."); Exec. Order No. 13,491, § 3, 3 C.F.R. 200 (2009) (directing that individuals detained during armed conflict "shall in all circumstances be treated humanely and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture)"). Such conduct during an armed conflict is a war crime. *E g.*, Geneva Convention Relative to the Treatment of Prisoners of War, art. 130, Aug. 12, 1949, 6 U.S.T. 3316, 3420 (Third Geneva Convention) (grave breaches include torture or inhuman treatment of protected persons during periods of international conflict); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 3618 (same); *id.* art. 3, 6 U.S.T. at 3518-3520 (prohibiting cruel treatment and torture during periods of non-international conflict); 18 U.S.C. 2441 (criminal penalties for commission of "war crime," defined as, *inter alia*, "a grave breach in any of the international conventions signed at Geneva 12 August 1949" or certain enumerated breaches of "common Article 3").

The United States has at its disposal a variety of tools, enhanced in the wake of events at Abu Ghraib, to punish the perpetrators of acts of torture, to prevent acts of abuse and mistreatment, and to compensate individuals who were subjected to abusive treatment while detained by the United States military. In addition to the criminal prohibitions discussed above, other criminal and contractual remedies are available to punish wrongdoers. *E g.*, 18 U.S.C. 3261(a)(1) (criminal jurisdiction over felonies committed "while employed by or accompanying the Armed Forces outside the United States"); 10 U.S.C. 802(a)(10) (military jurisdiction over "persons serving with or accompanying an armed force in the

field" "[i]n time of declared war or a contingency operation"); Dep't of Defense (DoD), *Section 1206 Public Law 108-375 Report* 10-13 (2005) (describing criminal and contractual remedies).[3]

The United States Government also has taken a number of steps to improve contractor oversight. *E.g.*, National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 841, 122 Stat. 230 (establishing independent "Commission on Wartime Contracting" to study contracting in Iraq and Afghanistan; reports and hearing documents available at http://www.wartimecontracting.gov; final report due to Congress July 2011); Congressional Research Service, *DoD Contractors in Afghanistan & Iraq: Background & Analysis* 18-19 (Mar. 29, 2011) (noting steps DoD has taken to improve management of contractors in Iraq and Afghanistan). Significantly, moreover, Congress has now expressly barred civilian contractors from performing interrogation functions, and has required private translators involved in interrogation operations to undergo substantial training and to be subject to substantial oversight. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1038, 123 Stat. 2451; 75 Fed. Reg. 67,632 (2010).

Monetary compensation may also be available through the FCA, 10 U.S.C. 2734, to individual detainees

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[3] At the time of the events petitioners allege, extraterritorial criminal jurisdiction did not extend to civilian employees or contractors for other federal agencies, National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1088, 118 Stat. 2066, and military jurisdiction was limited to "persons serving with or accompanying an armed force in the field" after a formal declaration of war, National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2217.

subjected to abuse and mistreatment. See Pet. App. 4; *Titan* C.A. App. 759. Petitioner Saleh filed a claim under this administrative regime and was offered $5000 after a U.S. Army investigation concluded that he "was never interrogated while detained at Abu Ghraib, and was not abused while in the custody and control of US forces while at the prison." *Id.* at 751; see Pet. App. 4.

Civilian contractors may also be subject to Iraqi legal process in certain circumstances. Prior to 2009, civilian contractors were provided immunity from Iraqi legal process "with respect to acts performed by them pursuant to the terms and conditions of a Contract or any subcontract thereto." U.S. Army, *Coalition Provisional Auth. Order No 17*, § 4(3) (June 2004); see *id.* §§ 4(5), 5(1). Since January 1, 2009, most United States contractors and their employees in Iraq have been subject to unrestricted liability under Iraqi law. *U.S./Iraq Agreement, Withdrawal of U.S. Forces from Iraq & the Org. of Their Activities during Their Temporary Presence* 8, 18, at http://www.state gov/documents/organization/122074.pdf (last visited May 26, 2011).

2. Some former Iraqi detainees, including petitioners here, have instead (or additionally) turned to the tort laws of the several States as a means of obtaining redress.[4]

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[4] The government is aware of three other pending civil suits brought by foreign nationals against civilian contractors alleging abusive treatment arising out of their detention at the Abu Ghraib prison. See *Al Shimari v. CACI Premier Tech., Inc.*, 657 F. Supp. 2d 700 (E.D. Va. 2009) (denying contractor's motion to dismiss state-law tort claims), appeal pending, No. 09-1335 (4th Cir.); *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702 (D. Md. 2010) (same), appeal pending, No. 10-1921 (4th Cir.); *Abbasi v. CACI Premier Tech., Inc.*, No. 09-229 (D.D.C. filed Feb. 5, 2009) (case stayed). Oral argument on the interlocutory appeals in *Al Shimari* and *Al-Quraishi* was held on October 26, 2010, and the

a. In evaluating petitioners' state-law claims, the court of appeals relied on this Court's decision in *Boyle* to recognize a federal preemption defense informed by the FTCA's combatant activities exception. That general approach is consistent with *Boyle*, though as we explain, the way in which it applied *Boyle* was unclear and potentially problematic, depending on how the court of appeals' decision is read in future cases. In *Boyle*, the Court looked to the FTCA's discretionary function exception to inform the preemption analysis where invocation of state law raised a "discrete conflict in which satisfying both state and federal duties * * * was impossible." Pet. App. 15. The Court, however, recognized that "[d]isplacement" may also be appropriate if "the application of state law would 'frustrate specific objectives' of federal legislation" and that, "[i]n some cases," the federal interest may require "a uniform rule" such that the "entire body of state law applicable to the area conflicts and is replaced by federal rules." *Boyle*, 487 U.S. at 507-508.

Here, much as in *Boyle*, the subject of petitioners' suits—namely, "the treatment of prisoners during wartime"—implicates "uniquely federal interests." Pet. App. 87; *id.* at 13; *id.* at 49 (Garland, J., dissenting); cf. *Boyle*, 487 U.S. at 504-507. Those interests include ensuring that detention operations are conducted in a manner consistent with humane treatment obligations and the laws of war and that contractors are held accountable for their conduct by appropriate means—as well as avoiding unwarranted judicial second-guessing of sensitive judgments by military personnel and con-

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court of appeals is holding those cases in abeyance pending resolution of this petition. Dkt. Nos. 72, 75 (No. 09-1335), Dkt Nos. 40, 43 (No. 10-1921).

tractors with which they interact in combat-related activities, and ensuring that there are appropriate limits on private tort suits based on such activities. By contrast, as the court below observed, it is not clear what interest any particular State would have in the subject of this suit by Iraqi nationals arising out of their detention by the United States military in Iraq. See Pet. App. 20, 25-26; cf. *id.* at 70-71 (Garland, J., dissenting) (noting that "many states would indeed have little or no interest in this particular litigation," but suggesting States may have an "interest in ensuring that their corporations refrain from abusing prisoners—even in a foreign country"); *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 425-427 (2003) (contrasting the weakness of the state interest with the strength of the federal interest in addressing conduct in a foreign country).[6]

In this field of uniquely federal interests, petitioners' reliance on a presumption against preemption of a State's exercise of its "historic police powers," Pet. 27 (citation omitted), is misplaced. See *Boyle*, 487 U.S. at 504, 507-508; see also *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 347-348 (2001) (holding that no presumption against preemption applies in an area States have not traditionally occupied). And as this Court made clear in *Boyle*, to find displacement of state law in an area of uniquely federal interests, "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Con-

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[6] As the court of appeals noted, petitioners "did not, at the briefing stage, even identify *which* sovereign's substantive common law of tort should apply to their case although at oral argument counsel explained that, in [their] view, D.C. law applied." Pet. App. 23. Petitioners have disclaimed Iraqi law as a basis for their claims. See *id.* at 69 n.20 (Garland, J., dissenting).

gress legislates 'in a field which the States have traditionally occupied.'" *Boyle*, 487 U.S. at 507 (citation omitted).

In giving effect to the unique federal interests at issue, the court of appeals reasonably turned to the FTCA's combatant activities exception for guidance. The court explained that the policy embodied in that exception is "the elimination of tort from the battlefield, both to preempt state or foreign regulation of federal wartime conduct and to free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit." Pet. App. 15. To be sure, the FTCA does not directly apply to the actions of private contractors or render the United States liable for their actions. See 28 U.S.C. 2671 ("[T]he term 'Federal agency' * * * does not include any contractor with the United States."); Pet. App. 60-61 (Garland, J., dissenting). But *Boyle* nonetheless makes clear that a state-law claim against a government contractor may be preempted insofar as it conflicts with significant federal interests, and that the contours of the preemption may be informed by the FTCA.

Although the FTCA's combatant activities exception is directly triggered only by actions of United States military and civilian personnel themselves, the court of appeals in this case determined that the policies embodied in that exception can also be implicated by the actions of contractor employees who are closely integrated into combat-related activities. Pet. App. 15. The court reasoned that, in both situations, a state-law tort suit raises "the prospect of military personnel being haled into lengthy and distracting court or deposition proceedings" and "extensive judicial probing of the government's wartime policies." *Id.* at 16. The court also con-

sidered in this setting: the availability of alternative remedies (*id.* at 17; pp. 8-10, *supra*); Congress's failure to provide a federal civil cause of action for torture despite enacting "comprehensive legislation dealing with the subject of war crimes, torture, and the conduct of U.S. citizens acting in connection with military activities abroad" (Pet. App. 28 n.9); Congress's decision to limit the scope of the federal cause of action it created in the Torture Victim Protection Act of 1991, 28 U.S.C. 1350 note, to persons acting under the authority or color of law of a foreign nation (Pet. App. 28 n.9); and the prospect of subjecting military policy judgments to the laws of "fifty-one separate sovereigns" (*id.* at 23).[6]

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[6] Petitioners appear to rely on a recent amendment to the Defense Federal Acquisition Regulation Supplement to contend (Pet. 35) "that the Executive recently reaffirmed the use of the existing system of tort liability as one mechanism to deter misconduct" by its contractors. That amendment provides that "[c]ontract performance in support of U.S. Armed Forces deployed outside the United States may require work in dangerous or austere conditions. Except as otherwise provided in the contract, the Contractor accepts the risks associated with required contract performance in such operations." 48 C.F.R. 252.225-7040(b)(2). In responding to public comments, DoD affirmed that "the clause retains the current rule of law," as expressed in recent court cases, "holding contractors accountable for the negligent or willful actions of their employees, officers, and subcontractors." 73 Fed. Reg. 16,768 (2008). DoD further clarified, however, that the amendment "makes no changes to existing rules regarding liability," and that "[c]ontractors will still be able to defend themselves when injuries to third parties are caused by the actions or decisions of the Government." *Ibid.* DoD's response to public comments also suggested that *Boyle* "does not apply when a performance-based statement of work is used in a services contract," and that the amended rule should not "invite courts to shift the risk of loss to innocent third parties" through "defenses based on the sovereignty of the United States" for the contractor's "own actions." *Ibid.* In this case, the court of appeals concluded that respondents were not acting under a "performance-

b. The court of appeals' recognition of a federal preemption defense informed by the FTCA is generally consistent with the approach this Court took in *Boyle*. But the court's description of the contours of that defense is inexact, unclear, and potentially misguided in certain respects.

For example, the court of appeals appears to have focused its inquiry on whether the contractor was itself "engaging in combatant activities" (Pet. App. 15) or was "integrated into combatant activities" (*id* at 19). In phrasing the test in this manner, the court may have misunderstood the circumscribed role private contractors play in war zones. Under domestic and international law, civilian contractors engaged in authorized activity are not "combatants"; they are "civilians accompanying the force" and, as such, cannot lawfully engage in "combat functions" or "combat operations." See DoD, *Instruction 3020.41: Contractor Personnel Authorized to Accompany the U.S Armed Forces* ¶ 6.1.1 (Oct. 3, 2005); *id.* ¶ 6.1.5 ("Functions and duties that are inherently governmental are barred from private sector performance."); DoD, *Instruction 1100.22: Policy & Procedures for Determining Workforce Mix*, Encl. 4, ¶ 1.c(1)(b) (Apr. 12, 2010) ("Combat Operations" are inherently governmental); 73 Fed. Reg. at 16,764-16,765 ("[T]he Government is not contracting out combat functions."); Army Reg. 715-9, ¶ 3-3(d) (1999) ("In the context of the law of war, contracted support service personnel are civilians accompanying the force. * * * They may not be used in or undertake any role that could jeopardize their status as civilians accompanying

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based statement of work." Pet. App. 20-21 (emphasis and citation omitted). And, to the extent there is ambiguity, DoD's response to public comments was not intended to opine on the state of the law.

the force."). International law recognizes that civilians authorized to accompany the force in order to provide support are entitled to certain status and protections. *E.g.*, Third Geneva Convention, art. 4.A(4), 6 U.S.T. at 3320 (including "[p]ersons who accompany the armed forces without actually being members thereof" within the definition of "[p]risoners of war").

Moreover, application of the FTCA's combatant activities exception, on which the court of appeals drew, does not turn on whether a challenged act is itself a "combatant activity," or whether the tortfeasor is himself engaging in a "combatant activity." Rather, it speaks of claims "*arising out of* the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. 2680(j) (emphasis added). A more precise focus on claims "arising out of" the *military's* combatant activities would allow for a more accurate assessment of the contractor's distinct role, and avoid confusing it with the role of military personnel.

In addition, the court of appeals did not address whether application of the preemption defense it recognized would be appropriate if the contractor employees acted outside the scope of their employment or the contractor acted outside the scope of the contract, nor did it address the contours of either such limitation. Petitioners and the dissent expressed concern that, because the court of appeals failed to consider whether the tortfeasors acted within the scope of their employment, contractor employees might be afforded "more protection than our soldiers and other government employees receive [under the Westfall Act]," "which provides that, '[u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment,' the federal employee is dismissed

and 'the United States shall be substituted as the party defendant.'" Pet. App. 61 (Garland, J., dissenting) (emphasis omitted) (quoting 28 U.S.C. 2679(d)(1)); Pet. 21, 30-31; cf. *Rasul* v. *Myers*, 563 F.3d 527, 528 & n.1 (D.C. Cir.) (alleged acts of mistreatment of detainees by government employees within scope of employment under Westfall Act), cert. denied, 130 S. Ct. 1013 (2009). Whatever force that argument may have in the abstract, or in other contexts, here the only defendants are civilian contractors (not the individual contractor employees). The employees' actions must, by definition, fall within the scope of their employment for petitioners to prevail under the doctrine of respondeat superior.

c. The Court's review is not warranted at this time. There is no circuit conflict on this question. Only one other court of appeals has addressed federal preemption based on the combatant activities exception, and that decision is consistent with the decision below. See *Koohi* v. *United States*, 976 F.2d 1328 (9th Cir. 1992) (state-law tort claims brought against contractor, alleging defects in manufactured weapons system used in accidental shooting of Iranian commercial airplane flying in combat zone), cert. denied, 508 U.S. 960 (1993). As petitioners note (Pet. 30-31), *Koohi* arose on different facts, and the underlying rationale would not necessarily dictate the same result here. Nonetheless, the only two appellate decisions are consistent with one another, and the absence of any other appellate decision in the intervening two decades counsels in favor of awaiting further developments in the lower courts.

Petitioners assert that the court's decision will "immunize[]" several hundred-thousand contractor employees, "cover[] all contractor employees supporting the military in Iraq and Afghanistan," and provide "nothing

short of full immunity for all contractors supporting the military during a time of war." Pet. 20-21, 33-34. Those assertions considerably overstate the scope of the court of appeals' holding. The court held that federal preemption is appropriate where the alleged acts occur (1) "[d]uring wartime," (2) "where a private service contractor is integrated," (3) "into combatant activities," (4) "over which the military retains command authority," (5) unless the contractor is providing services in "such a discrete manner" that they "could be judged separate and apart from combat activities of the U.S. military." Pet. App. 19-20. The court of appeals did not define the term "combatant activities," and that issue was never litigated because petitioners did not dispute that respondents' actions qualified. See *id.* at 13. Nor did the court elaborate upon any circumstances beyond this case when a contractor would be regarded as sufficiently "integrated" into combatant activities; what may be necessary in other circumstances for the military to "retain[] command authority"; or when services might be supplied in a sufficiently "discrete" manner that they could be judged separate from the military. *Id.* at 19-20. These are important limitations and the court of appeals' decision leaves them open for further elaboration and clarification in future cases. Any review by this Court would significantly benefit from further explication of those issues in concrete factual settings.[7]

Last Term this Court denied the certiorari petition in *Carmichael*, *supra*, which also raised issues concerning

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[7] This case is also atypical of those cases that have raised questions about the doctrinal framework governing claims against government contractors providing support to the United States military and, as explained above (pp. 8-10, *supra*), the United States has taken a number of steps to prevent future abuses of the kind petitioners allege.

claims against government contractors providing support to the United States military. The petitioner in *Carmichael* sought review of an Eleventh Circuit decision dismissing, on political-question grounds, state-law tort claims brought by a U.S. servicemember against a contractor providing tactical support to the Army in Iraq. *Carmichael* v. *Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271 (2009), cert. denied, 130 S. Ct. 3499 (2010). In a brief filed at the Court's invitation, the government noted that this area of the law would benefit greatly from further percolation in the lower courts. Gov't Br. at 9, 13-14, 22, *Carmichael*, *supra* (No. 09-683). Notably, at that time, the D.C. Circuit had already issued its decision in this case, and the case was discussed in the government's amicus brief. *Id.* at 13, 21-22. Although some district courts have decided related cases in the ensuing year, no other appellate court has issued a decision. Cf. note 4, *supra* (noting pending appeals in the Fourth Circuit). Further percolation with respect to the novel and complex issues raised by this and other similar cases is needed as much today as it was when this Court denied review in *Carmichael*.

3. Petitioners also ask this Court to grant review on whether petitioners' claims of torture and other war crimes can be brought against private actors under the ATS. That question is not squarely presented in this case, does not implicate any circuit conflict, and does not warrant this Court's review.

Contrary to petitioners' assertion (Pet. 5), the court of appeals did not rule that "claims for murder, torture and other war crimes under the [ATS] could not be brought against non-state parties." Rather, the court rejected petitioners' ATS claims based on its conclusion that they had not properly pursued claims of murder,

torture, or other war crimes on appeal, and that claims based on assault and battery reflected an "untenable" articulation of a "supposed consensus of international law." Pet. App. 4, 33. Although petitioners respond (Pet. 14 n.4) that the court of appeals ignored specific allegations of war crimes and torture set forth in their complaints and on appeal, that fact-specific issue does not warrant this Court's review.

The court of appeals also stated that "[a]ssuming, *arguendo*, that [petitioners] had adequately alleged torture (or war crimes)," torture committed by private actors is not recognized as a violation of a settled international law norm. Pet. App. 34. The court did not hold, however, that war crimes—including torture when inflicted on a protected person in the course of armed conflict, which is a war crime (p. 8, *supra*)—cannot be asserted against non-state actors. Instead, in a footnote, the court recognized that "it may be that 'war crimes' have a broader reach" than torture alone. *Id.* at 34 n.13. But because it did not view petitioners as having presented such allegations on appeal, the court did not decide that issue. *Ibid.* Thus, at most, the court of appeals' decision could be read as holding, in the alternative, that conduct by a non-state actor that is not committed under color of law, or as a war crime, does not support a claim for torture in violation of a well-settled international law norm for purposes of ATS analysis.

That alternative holding does not implicate any circuit conflict. The cases petitioners cite address state action for claims of torture "in the course of war crimes" or "in furtherance of war crimes" (Pet. 16 (citation omitted))—the precise issue the court of appeals declined to decide. *Kadic* v. *Karadžić*, 70 F.3d 232, 241-243 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996), held that

claims of genocide and war crimes (including torture when perpetrated in the course of genocide and war crimes) are actionable against non-state actors. See *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 582 F.3d 244, 254-255 (2d Cir. 2009) (describing *Kadic* as recognizing "that claims for genocide and war crimes against individuals could proceed without state action"), cert. denied, 131 S. Ct. 122 and 131 S. Ct. 79 (2010); *Abdullahi* v. *Pfizer, Inc.*, 562 F.3d 163, 173 (2d Cir. 2009) (same), cert. denied, 130 S. Ct. 3541 (2010). Likewise, in *Romero* v. *Drummond Co.*, 552 F.3d 1303, 1316 (2008), the Eleventh Circuit cited *Kadic* for the proposition that "individuals may be liable, under the law of nations, for some conduct, such as war crimes, regardless of whether they acted under color of law of a foreign nation." See *Sinaltrainal* v. *Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009). In contrast, the Second Circuit in *Kadic* stated that "torture and summary execution—when not perpetrated in the course of genocide or war crimes—are proscribed by international law only when committed by state officials or under color of law." 70 F.3d at 243; see *Bigio* v. *Coca-Cola Co*., 239 F.3d 440, 448 (2d Cir. 2001).[8]

As petitioners appear to recognize (Pet. 17), the issue in the above-cited cases was not whether claims against private actors are cognizable in suits based on the ATS as a general matter. Under the norm-by-norm approach of *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), acts committed by non-state actors may or may not violate international law, depending on the violation alleged. No court of appeals, including the court below, has held

[8] The Second Circuit has since also held that there is no corporate liability under the ATS. See *Kiobel* v. *Royal Dutch Petroleum Co*., 621 F.3d 111 (2010).

that acts committed by non-state actors are categorically beyond the reach of the ATS.

Consideration by this Court of petitioners' claims based on the ATS is unwarranted for an additional reason. This suit is brought by foreign nationals against U.S. persons based on conduct occurring in a military setting in a foreign country, and it therefore raises a threshold question whether a federal common-law cause of action based on the jurisdictional grant in the ATS should be created in these circumstances. See *Sosa*, 542 U.S. at 725-728; cf. Pet. App. 34-37; *Rasul*, 563 F.3d at 532 n.5 (special factors counsel against creating *Bivens* cause of action by foreign nationals against U.S. officials based on allegations of abuse in military detention).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

HAIDAR MUHSIN SALEH, ILHAM NASSIR IBRAHIM, et al.,

Petitioners,

—v.—

CACI INTERNATIONAL and TITAN CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* HUMAN RIGHTS FIRST, HUMAN RIGHTS WATCH, PHYSICIANS FOR HUMAN RIGHTS, CENTER FOR VICTIMS OF TORTURE, AND LAW PROFESSORS ILIAS BANTEKAS, JOHN CERONE, SCOTT HORTON, AND MARCO SASSOLI IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICI CURIAE[1]

International human rights law recognizes and seeks to enforce the inalienable rights of all persons that derive from their very humanity. International humanitarian law regulates conduct during hostilities and affords significant protections to persons detained in connection with war. The United States has long championed the principles of international human rights and humanitarian law. Over the course of its history, the United States has subscribed to numerous international human rights and humanitarian law instruments—some of which it helped create—that protect individuals from torture and other gross human rights violations.

Amici, the organizations and experts listed below, are dedicated to the support and defense of those rights and protections and have a unique perspective and expertise on the issues arising in this case insofar as they intersect—as they surely do—with international human rights and humanitarian law. The following organizations join this brief:

Human Rights First promotes laws and policies that advance universal rights and freedoms and exists to protect and defend the dignity of each

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

individual through respect for human rights and the rule of law.

Human Rights Watch (HRW) is one of the world's leading independent organizations dedicated to defending and protecting human rights. HRW investigates and exposes human rights violations and holds abusers accountable. HRW currently monitors human rights abuses in over 80 countries.

Physicians for Human Rights harnesses the specialized skills of doctors, nurses, public health specialists, and scientists to investigate and stop human rights abuses.

The Center for Victims of Torture (CVT) is an internationally respected torture treatment center with more than 25 years of experience treating torture survivors. CVT works to heal the wounds of torture on individuals, their families and their communities and to stop torture worldwide.

In addition, the following experts join this brief in their personal capacity (affiliations are provided for identification purposes only):

Ilias Bantekas is a Professor of International Law and Associate Director of the Centre for International and Public Law at Brunel University School of Law in the United Kingdom. He is an expert in international humanitarian law and public international law.

John Cerone is Professor of International Law and Director of the Center for International Law & Policy at New England Law | Boston. He is an expert in human rights and international humanitarian law.

Scott Horton is a lecturer in law at Columbia Law School and is an expert in national security and public international law.

Marco Sassoli is a Professor and Director of the Department of International Law and International Organization at the University of Geneva, and Associate Professor at the Universities of Quebec in Montreal and Laval, Canada. He is an expert in human rights and international humanitarian law.

SUMMARY OF ARGUMENT

The torture and abuse visited on detainees at Abu Ghraib was a violation of fundamental human rights and humanitarian law principles. The majority decision of the court of appeals below was also reached in apparent disregard of, and contrary to, those principles. The decision by the D.C. Circuit to immunize the tortious conduct of private military contractors on the ground that such contractors were "integrated into combatant activities over which the military retains command authority" is incompatible with principles of international law to which the United States has subscribed in at least two respects. First, it leaves the aggrieved parties without a civil remedy for the violations of their human rights. Second, it ignores that individuals taken and detained in the course of combat are owed a duty of care under the Geneva Conventions and that civil liability arises from violation of that duty. The court's unprecedented extension of the government contractor defense articulated in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1992), to immunize

unauthorized tortious conduct cannot be reconciled with those principles.

Denying a tort remedy to plaintiffs by extending the government contractor defense here would perpetuate a pernicious gap in accountability. Unlike certain military personnel, no private contractor at Abu Ghraib has been criminally prosecuted. Immunizing government contractors for the acts alleged would create the appearance that the United States condones torture by proxy or is even willing to invite abuses by outsourcing certain military functions to private actors for whose conduct the government need not answer. The problem is not a small one, as there are more contractors than soldiers in Iraq and Afghanistan.[2]

For these reasons in addition to those set forth in the Petition, certiorari should be granted and the decision of the court of appeals below should be reversed.

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[2] *See* Petition for Certiorari at 20-21.

ARGUMENT

I. THE GOVERNMENT CONTRACTOR DEFENSE SHOULD NOT BE EXTENDED IN THE NAME OF A FEDERAL INTEREST WHERE SO DOING UNDERMINES THE U.S. COMMITMENT TO INTERNATIONAL HUMAN RIGHTS

A. The United States Has Embraced a Policy of Ensuring That a Civil Remedy Exists for Victims of Gross Human Rights Violations

International human rights law prohibits the mistreatment of persons in government custody in all circumstances, whether in peace or wartime. A crucial component of international human rights law is the right to fair and adequate compensation for violations of human rights—including the torture and other acts of abuse alleged by plaintiffs here.

The right to a remedy is enshrined in international treaties and international customary law, including in Article 14 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") and in Articles 2(3)(a) and 9(5) of the International Covenant on Civil and Political Rights ("ICCPR")—each of which has been ratified by the United States.[3] The right to a remedy is also reflected in Article 8 of the Uni-

[3] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, at 197, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984); International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), at 52, 21 U.N. GAOR Supp. (No. 16) U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 .

versal Declaration of Human Rights, a proclamation of the United Nations General Assembly, which states that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[4] In addition, the Geneva Conventions recognize various private rights and contemplate compensation in courts of law.[5] As a party to instruments such as the CAT, the ICCPR and the Geneva Conventions—and as the earliest proponent of the Universal Declaration of Human Rights--the United States has demonstrated its commitment to protecting international human rights and to providing a right to a remedy where, as here, those rights are alleged to have been violated.

These principles were recently affirmed by the United States and other states in the Montreux Document,[6] which, while not a legally binding instrument, contains various "statements" that are relevant to the principle that states are responsible for providing a right to a remedy, even where gross human rights abuses may be perpetrated by private actors (regardless of whether

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[4] Universal Declaration of Human Rights, G.A. Res. No 217A (III), art. 8, UN GAOR, 3rd. Sess., 1st plen. Mtg., U.N. Doc A/810 (Dec. 12, 1948).

[5] *See, e.g.*, Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503, 516 nn. 43-45 (2004).

[6] International Committee of the Red Cross, *Montreux Document on the Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict*, September 17, 2008.

international human rights law is found to extend to private actors). Most notably, Statement #4 provides: "Contracting States are responsible to implement their obligations under international human rights law. . . . To this end they have the obligation, in specific circumstances, to take appropriate measures to prevent, investigate *and provide effective remedies for* relevant misconduct of PMSCs [private military and security companies] and their personnel." (emphasis supplied). A section on "good practices" follows, which includes this recommendation (#72): "To provide for non-criminal accountability mechanisms for improper and unlawful conduct of PMSCs and their personnel, including: (a) providing for civil liability; and (b) otherwise requiring PMSCs to provide reparation to those harmed by the misconduct of PMSCs and their personnel."

The United States relies on state as well as federal law to provide the civil remedy due victims of human rights violations.[7] Lawsuits in pursuit of a

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[7] *See, e.g.*, United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture, *Consideration of Reports Submitted By States Parties Under Article 19 of the Convention, Addendum to the Initial Reports of State Parties Due in 1995, United States of America*, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000) [hereinafter U.S. Report to CAT (2000)]; U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01, ¶ 5 (daily ed., April 2, 1992) ("[T]o the extent that state and local governments exercise jurisdiction over [matters relating to the Covenant], the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.").

remedy for a violation of international human rights have a long history in our state courts and a number of state court decisions have addressed war crime and human rights liability.[8]

Contrary to this principle and precedent, the decision of the D.C. Circuit in this case will result in victims of torture or other abuse at the hands of private military contractors being precluded from any meaningful remedy. The existence of the Foreign Claims Act ("FCA"), 10 U.S.C. § 2734, which provides for compensation, through an administrative process, to individuals who suffer, *inter alia*, personal injury or death as a result of non-combat activities of the armed forces, does not cure the problem created by the D.C. Circuit in this case. The FCA covers "civilian employee[s] of the military department concerned," but does not provide for compensation for the injurious acts of civilian contractors who work for private companies. The FCA, therefore, does not provide a mechanism to compensate the victims of abuses

[8] *See, e.g., Christian County Court v. Rankin & Tharp*, 63 Ky. 502, 505-06 (1866):

> [T]here is either no remedy for the wrong, or it must be an action against the persons who did the wrong. There must be a remedy, and of that remedy the State judiciary has jurisdiction. There is nothing in the Federal Constitution which deprives a State court of power to decide a question of international law incidentally involved in a case over which it has jurisdiction; and for every wrong the common law of Kentucky provides an adequate remedy. To sustain this action, therefore, it is not necessary to invoke any statutory aid.

perpetrated by private military contractors.[9] There is therefore a gap in federal law—the need to compensate victims of wartime abuses committed by private military contractors—that state tort law is available to fill.

B. The United States Has a Uniquely Federal Interest In Effectuating the Human Rights Law Principles It Has Adopted and Can Do So By Making a Civil Tort Remedy Available To Alleged Victims

The D.C. Circuit erred in holding that allowing plaintiffs' state law claims to proceed against military contractors would create a "significant conflict" with federal interests. Quite the contrary, precluding such claims creates a significant conflict with the unique federal interest in effectuating the values and goals of international human rights law, such as those espoused in the Montreaux Document, which the U.S. has publicly embraced.

The government contractor defense is not based on constitutional or statutory authority, but rather constitutes "federal law of a content prescribed . . . by the courts—so-called 'federal common law.'" *Boyle*, 487 U.S. at 504 (citations

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[9] A claim brought under the FCA by the widow of an Iraqi man who was killed by private military contractors was denied because contractors are not governmental employees. *See* American Civil Liberties Union, Documents Received From the Department of the Army in Response to ACLU Freedom of Information Act Request (released on Oct. 31, 2007), http://www.aclu.org/natsec/foia/log.html (Army Bates 555-557).

omitted). The federal courts recognize the need to tread cautiously when judicially "legislating" substantive outcomes under the rubric of federal common law.[10] Here, the D.C. Circuit has extended the government contractor defense to preempt claims arising out of facts that are dramatically different from those of *Boyle*. Moreover, the D.C. Circuit has failed to take the relevant principles of international human rights law, including principles that have been incorporated into federal law, into account. This results in a judicially-created conflict with international norms that the United States embraces.[11]

In appropriate cases, federal courts look to international law when interpreting federal statutes or applying federal common law.[12] This

[10] Despite the need to engage in interstitial lawmaking from time to time, *see Boyle*, 487 U.S. at 531 (Stevens, J. dissenting), federal courts should be reluctant to create new rules of decision in cases raising novel policy questions more appropriate for Congress. *See, e.g.*, *Bush v. Lucas*, 462 U.S. 367 (1983); *United States v. Gilman*, 347 U.S. 507, 511 (1954). *See also Ibrahim v. Titan Corp. I*, 391 F. Supp. 2d 10, 14 (D.D.C. 2005) (noting that since *Erie v. Tompkins*, 304 U.S. 64 (1938), the role of federal common law has been dramatically reduced, and courts have generally looked for legislative guidance before taking innovative measures).

[11] *See* Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 661 (2007) (By seeking to read domestic legislation consistently with international commitments undertaken by the political branches, a court . . . can ensure that its government is not compromised or embarrassed in the foreign affairs arena.).

[12] *See, e.g.*, *Weinberger v. Rossi*, 456 U.S. 25, 29-30, 32-33 (1982); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953).

approach is consistent with the words of this Court in *The Paquete Habana*: "International law is part of our law, and must be ascertained and administered by the courts of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." 175 U.S. 677, 700 (1900). Federal courts draw on treaties and customary international law to decide matters ranging from boundary disputes to questions of treaty interpretation and official immunity.[13] In particular, federal courts—including this Court—have looked to international law to shape the law applicable to the treatment of prisoners and detainees.[14]

International law also has a limiting value for the federal courts. Courts consult that law because an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. *Murray v. The Schooner Charming Betsy*, 2 Cranch 64, 118 (1804); *F. Hoffmann-La Roche Ltd. v. Empagran*

[13] *See, e.g., Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 891-93 (2d Cir. 1981) (finding that under customary international law, compensation for a taking was required); *Connecticut v. Massachusetts*, 282 U.S. 660, 670 (1931) (noting relevance of international law to boundary disputes); *United States v. Enger*, 472 F. Supp. 490, 540-41 (D.N.J. 1978) (construing the congressional intent underlying the term goods or chattels of a diplomat by reference to customary international law).

[14] *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 613 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004). *See also Lareau v. Manson*, 507 F. Supp. 1177, 1188 n.9 (D. Conn. 1980) (Cabranes, J.), *aff'd in part*, 651 F.2d 96 (2d Cir. 1981); *Fernandez v. Wilkinson*, 505 F. Supp. 787, 795-98 (D. Kan. 1980), *aff'd on other grounds sub nom., Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981).

S.A., 542 U.S. 155, 164 (2004). This premise is even more important in the federal common law context. Just as courts will not assume that an act of Congress is intended to create a conflict with international law, they should also take care not to create such conflicts when engaged in judicial lawmaking.

The desirability of conforming federal judge-made law to international norms is particularly compelling when Congress has already indicated agreement with those norms by voting in favor of U.S. accession to the CAT. In its initial report to the U.N. Committee Against Torture, the United States discussed the role of the FTCA in upholding U.S. obligations pursuant to the CAT. By waiving the sovereign immunity of the United States so that civil actions seeking money damages can proceed in federal court, the United States asserted that the FTCA provides a mechanism by which victims of abuse may sue the United States "for personal injury or loss of property caused by a negligent or wrongful act or omission of a government employee acting within the scope of his or her office or employment."[15] The United States noted that the FTCA makes it possible for victims of abuse to sue "federal law enforcement officers for intentional torts, including assault, battery, and false arrest."[16] It is ironic that the FTCA—the same federal statute proffered by the State Department as providing a civil remedy for injuries caused in violation of the international ban on cruel, inhuman and degrading

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[15] U.S. Report to CAT (2000), ¶ 275.

[16] *Id.*

treatment or punishment—is now the basis for a claimed immunity by those who are alleged to have violated those norms.

The scope of the government contractor defense should be interpreted in a manner that recognizes the unequivocal international prohibition of torture and other cruel, inhuman, or degrading treatment or punishment, and the importance placed by international human rights law on the right to a civil remedy for such abuses.[17] The decision of the D.C. Circuit creates a judge-made rule of decision that denies the victims of human rights abuses the civil remedy embraced by international law and U.S. policy.

[17] Regardless of whether the CAT or the ICCPR or other treaties the United States has signed but not ratified —directly create enforceable rights, the norms encapsulated by such treaties are enforceable where they have attained the status of binding customary international law. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 695 (2004); *The Paquete Habana*, 175 U.S. 677, 700 (1900). *See also Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1007 (9th Cir. 2005) (treating certain provisions of the U.N. Convention on the Rights of the Child—which the United States has not ratified—as customary international law for purposes of evaluating an agency interpretation).

II. THE GOVERNMENT CONTRACTOR DEFENSE, AS EXTENDED BY THE COURT OF APPEALS, CREATES A CONFLICT WITH U.S. OBLIGATIONS UNDER INTERNATIONAL HUMANITARIAN LAW

In addition to creating a conflict with international human rights law, the D.C. Circuit's decision creates a conflict with international humanitarian law ("IHL"), often referred to as the law of war. As this Court has confirmed in recent years, IHL plays an important role in defining the scope of U.S. obligations to persons in its custody.[18] The judge-made government contractor defense set forth in *Boyle* should not be expanded in such a way as to conflict with those obligations.

A. The D.C. Circuit's Decision Disregards the Duty of Care Owed to Detainees

The D.C. Circuit held that plaintiffs' state law tort claims are preempted because the application of state law would produce "significant conflict" with the federal interests represented by the "combatant immunity" exception to government tort liability under the FTCA. The court based its holding on the conclusion that "tort duties of reasonable care do not apply on the battlefield" and that the defendant contractors thus owed no duty

[18] *See Hamdan*, 548 U.S. 557, 560, 561-62 (2006) (recognizing that military commissions would have to comply with the "rules and precepts of the law of nations," including, *inter alia*, the four Geneva Conventions) (internal citations omitted); *Hamdi*, 542 U.S. at 520 (relying on the law of war, including Geneva and Hague Conventions to determine scope and limits on definition of enemy combatant).

of care to the plaintiff-detainees. *Saleh v. Titan Corp.*, 580 F.3d 1, 7 (D.C. Cir. 2009).

This conclusion is wrong. IHL governs the treatment of detained persons in wartime. IHL imposes a strict legal duty to protect persons in the custody of the detaining power, and prohibits the use of violence or cruel or degrading treatment of any sort. *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. at 613; Geneva Conventions, Common Article 3.[19] Because the court of appeals failed to acknowledge the duty of care owed to detained persons, who are necessarily *removed* from the battlefield, it incorrectly reasoned that a conflict exists between the standard of care imposed by tort law and what it supposed to be the absence of any such duty to detained persons. No conflict exists, and there is no basis for the court's unprecedented expansion of the government contractor defense to preempt civil suits arising out of the mistreatment of detainees in government custody by private military contractors.

Common Article 3, so called because it is found in all four Geneva Conventions, prohibits cruel treatment, torture, and outrages upon personal dignity against persons no longer taking active part in hostilities. It states:

> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, *detention*, or any other cause,

[19] Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Common Article 3].

> shall in all circumstances be treated humanely. . .
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> * * * *
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment. . . .

Id. (emphasis added). In *Hamdan*, this Court recognized that Common Article 3 establishes the minimum standard of humane treatment for all detainees held in any armed conflict. 548 U.S. at 557, 56-62. The Department of Defense (DOD) has reached the same conclusion:

> All persons subject to this Directive shall observe the requirements of the law of war, and shall apply, without regard to a detainee's legal status, at a minimum the standards articulated in Common Article 3 to the Geneva Conventions of 1949 . . . , as construed and applied by U.S. law, . . . in the treatment of all detainees, until their final release, transfer out of DoD control, or repatriation.

U.S. Dep't of Defense Directive 2310.01E, § 4.2, September 5, 2006.[20]

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[20] *See also* Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. 108-375, § 1091,

Both of the above authorities—one an expression of the law of nations that has been adopted by this Court, the other a clear expression of the view of the Executive Branch—contradict the view taken by the majority below. According to the majority opinion, "[w]e think that it is an untenable, even absurd, articulation of a supposed consensus of international law" that assault and battery could be condemned by that body of law. *Saleh*, 580 F.3d at 15. But the majority opinion is wrong. Under IHL, it is overwhelmingly clear that the assault and battery of a detained prisoner violates Article 3 of the Geneva Conventions.

B. The D.C. Circuit's Decision Fails to Recognize the Distinction Between Detention and the Battlefield

The distinction between the "battlefield" and "detention" is essential to the overall framework of IHL. If those two zones of activity are conflated into one—as the majority opinion below has done—Common Article 3 is rendered meaningless. The rights of detained persons to humane treatment would become unenforceable if detained persons were viewed as no different from the enemy soldier on the battlefield who poses an immediate threat and who lawfully can be shot dead.

Split second decisions are made on the battlefield and those decisions may harm innocent victims. It is the reality of war that a soldier may

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118 Stat. 2067 (2004) (the McCain Amendment): No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location shall be subject to cruel, inhuman, or degrading treatment or punishment.

justifiably fire his weapon at an apparent threat on the battlefield, only to subsequently discover that he has mistakenly killed or wounded an innocent civilian. To allow tort claims to proceed against soldiers for that conduct—the *authorized* use of force—would, as the majority below fears, hamper the military's ability to perform its function. The "combatant activities" exception of the FTCA may properly be construed to bar tort claims arising from such battlefield incidents. 28 U.S.C. § 2680(j).

But if the soldier's privilege to commit acts of violence on the battlefield were permitted to extend to the controlled environment of the detention center, immunity would be extended to conduct that is condemned by IHL and does not require the protection from civil liability that greatly concerns the majority opinion. For example, under the result of the court below, the guard at Abu Ghraib who without provocation works violence upon a detained person would nonetheless be immune from civil liability in the name of "eliminating tort concepts from the battlefield." *Saleh*, 580 F.3d at 7. To contend that there is no distinction between the battlefield and the detention center is to provide a free pass to soldiers and contractors to disregard the obligation imposed by Common Article 3 and to condone the intentional mistreatment of detained persons in violation of IHL.

The majority opinion below side-stepped this distinction in its effort to identify a significant conflict between a federal interest and applicable state tort law. In reaching this conclusion, the court relied on the Ninth Circuit's decision in

Koohi v. United States, 976 F.2d 1328 (9th Cir. 1992), but *Koohi* provides an illustration of IHL principles that undermines, rather than supports, the reasoning and result below. In *Koohi*, the Ninth Circuit applied *Boyle* to bar a products liability suit against a military contractor, for harm caused by the contractor's missile system used by the U.S. military against perceived enemy attackers on the battlefield (who in fact were civilians). *Id.* at 1337. The *Koohi* court looked to the FTCA for guidance on the question of whether allowing the tort suits to go forward would produce a "significant conflict" with federal policies or interests. *Id.* (applying *Boyle*, 487 U.S. at 504-13). *Koohi* concluded that the "combatant activities" exception to the FTCA precluded tort liability because under both domestic and international law, the military is entitled to defend itself and owes no "duty of care" to an attacker on the battlefield. *Id.* As the court explained, "one purpose of the combatant activities exception is to recognize that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of *authorized* military action." *Id.* (emphasis added).

Koohi's determination itself hinged on an application of IHL principles. Those principles authorize force to be directed towards military objectives, such as enemy forces on the battlefield. The plaintiffs in that case were owed no duty of reasonable care because plaintiffs appeared to be engaged with the defendants in combat. 976 F. 2d at 1337.

In this case, the D.C. Circuit failed to recognize that the IHL framework that drove the *Koohi*

court's decision compels the opposite conclusion here. In the battlefield context, military objectives may properly be targeted, and lawful, split-second military decisions may properly be insulated from judicial review. *See Koohi*, 976 F. 2d at 1337. By contrast, where military or civilian personnel are engaged in the detention of prisoners or suspected enemies who are *hors de combat*, IHL unambiguously imposes a legal duty of humane treatment. *See* Common Article 3. While the interpretation of the FTCA's combatant activities exception in *Koohi* can be harmonized with the laws of war, the D.C. Circuit's application of the statute to the fundamentally distinct factual circumstances here is inconsistent with the laws of war and should be rejected. *The Schooner Charming Betsy*, 2 Cranch at 118; *see also* RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS § 114 (1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.").

Amici can identify no federal interest in "eliminating tort concepts" from detention or in developing domestic jurisprudence that directly conflicts with U.S. obligations under IHL. To the contrary, there is a pre-existing and exceptionally strong federal interest in upholding the laws of war (and DOD policy to comply with those laws) including those that require the humane treatment of prisoners in U.S. custody. This federal interest is even stronger in counterinsurgency operations such as the one ongoing in Iraq, where protecting the lives of U.S. soldiers depends on winning over the hearts and minds of the population under occupation by demonstrating our

moral and legal accountability. As General David Petraeus explained in a recent U.S. Army counterinsurgency manual:

> Illegitimate actions are those involving the use of power without authority—whether committed by government officials, security forces, or counterinsurgents. Such actions include unjustified or excessive use of force, unlawful detention, torture, and punishment without trial. Efforts to build a legitimate government through illegitimate actions are self-defeating, even against insurgents who conceal themselves amid noncombatants and flout the law.
>
> Moreover, participation in [counterinsurgency] operations by U.S. forces must follow United States law, including domestic laws, treaties to which the United States is a party, and certain [host nation] laws. Any human rights abuses or legal violations committed by U.S. forces quickly become known throughout the local populace and eventually around the world. Illegitimate actions undermine both long- and short-term [counterinsurgency] efforts.

U.S. DEP'T OF THE ARMY, UNITED STATES ARMY COUNTERINSURGENCY HANDBOOK 1-24, ¶ 1-132 (2006) (reference omitted). *See also* V. TASIKAS ET. AL., RULE OF LAW HANDBOOK: A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES 67 (2007) ("in light of the need to establish the legitimacy of the rule of law among the host nation's populace, conduct by US forces that would be questionable

under any mainstream interpretation of international human rights law is unlikely to have a place in rule of law operations").

III. UNDER THE CIRCUMSTANCES OF THIS CASE, THE UNITED STATES HAS NO LEGITIMATE "UNIQUELY FEDERAL INTEREST" IN "MILITARY FLEXIBILITY"

The D.C. Circuit concluded that allowing state law tort suits to proceed against military contractors would conflict with federal interests because such suits "are really indirect challenges to the actions of the U.S. military," and would "surely hamper military flexibility." *Saleh*, 580 F.3d at 7, 8. But the court reached that conclusion without considering that the military *never* has the "flexibility" to command conduct involving torture or cruel, inhuman or degrading treatment.

The government contractor defense developed in response to a products liability claim arising from the malfunction of equipment manufactured to government specifications, where the uniquely federal interest at stake was "the procurement of equipment by the United States." *Boyle*, 487 U.S. at 507. To maintain the government's immunity from suits arising out of discretionary decisions such as the specifications of military hardware, the rule protects contractors whose products conform to specifications commanded by the government. As a result, the government contractor defense is analogous to the "superior orders" defense, which in some circumstances excuses tortious acts commanded by higher authority.

Extending *Boyle* to this case would be illogical and unjust, because neither the military nor its

contractors can *ever* lawfully exercise discretion or command to engage in acts of torture or other gross human rights violations. Both international law and U.S. federal law, *see* 18 U.S.C. § 2340A, 18 U.S.C. § 2441, make clear that torture and similar abuses are *never* acceptable, without exception. The "superior orders" defense is unavailable where the superior orders are manifestly unlawful,[21] which is necessarily the case when such orders would require or facilitate a clear violation of international human rights law:

> The government contractor defense is essentially based on the concept that the government told me to do it, and knew as much or more than I did about possible harms, so I can stand behind the govern-

[21] *See United States v. Ohlendorf* (the Einsatzgruppen Case), IV Trials of War Criminals 1, 470-73, 483-86; *The Llandovery Castle Case*, Supreme Court at Leipzig (1921), *reprinted in* 16 Am. J. Int'l L. 708, 721-22 (1922); *Attorney General v. Eichmann*, 45 Pesakim Mahoziim 3 (Jerusalem Dist. Ct. 1965), *reprinted in* 36 I.L.R. 18, 256 (1968); *The Zyklon B Case (Trial of Bruno Tesh and Two Others), reported in* 1 U.N. War Crimes Commission, Law Reports of the Trials of War Criminals 93 (1947). *See also* Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 U.N.T.S. 90 art. 33, s.1 (July 17, 1998) (superior orders defense available only where order "not manifestly unlawful"); United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Addendum to the Second Periodic Reports of States Parties Due in 1999, United States of America*, CAT/C/48/Add.3/Rev.1 ¶ 6 (Jan. 13, 2006) ("No circumstance whatsoever, including . . . an order from a superior officer or public authority, may be invoked as a justification for or defense to committing torture.").

> ment (which cannot be sued because of its immunity). It is designed in part to save the government money in its procurement costs . . . . [T]his defensive notion has been rejected [at Nuremburg and in other post-World War II criminal trials]. It should not be recognized, as the law now stands, by courts protecting civilians and land from depredations contrary to international law.

In re Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 91 (E.D.N.Y. 2005), *aff'd*, 517 F.3d 104 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 1524 (2009).

The absurdity of considering whether the government—and its contractors—can lawfully exercise their discretion to engage in or authorize torture may explain why the D.C. Circuit looked to the FTCA's "combatant activities" exception for the purpose of identifying a preemptive federal interest. Yet even the law governing combatant activities leaves no room for "flexibility" to command or condone the type of conduct alleged in this case. Just as no act of governmental "discretion" can justify torture, no military order—or delegation of responsibility—can provide a defense to the wrongdoing alleged here.

CONCLUSION

The federal government has an interest in its compliance with international norms of civilized behavior, whether expressed in statutes, treaties or customary international law. The appearance that the government's contractors are being given a free pass for serious acts of brutality can only

deprive the United States of any moral suasion in its ongoing struggle to achieve greater worldwide observance of these norms. It will also place into peril American citizens who may become captives of a foreign power and for whom the United States will demand treatment no worse than what it affords to others. *Amici* urge the Court to grant the writ of certiorari and to conclude that the expansion of the government contractor defense to immunize gross violations of human rights law and IHL is an unjust and unwarranted result.

Respectfully submitted,

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HAIDAR MUHSIN SALEH,
ILHAM NASSIR IBRAHIM, et al.,

Petitioners,

v.

CACI INTERNATIONAL and TITAN CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

BRIEF OF *AMICI CURIAE* PROFESSORS OF FEDERAL COURTS, INTERNATIONAL LAW, AND U.S. FOREIGN RELATIONS LAW IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

This brief of *amici curiae* is respectfully submitted in support of petitioners by law professors with expertise in federal courts, international law, and U.S. foreign relations law.[1] Many of the *amici* have been honored to appear as *amici* in other cases before this Court. *Amici* submit this brief because they believe the present case raises issues of vital importance to proper implementation of the Alien Tort Statute (ATS), the Federal Tort Claims Act (FTCA), and federal immunity defenses, areas in which *amici* have considerable scholarly expertise. In particular, *amici* believe that the D.C. Circuit opinion in this case manifests a fundamental misunderstanding of the scope of affirmative defenses that are relevant to petitioners' ATS claims.

A list of the *amici* appears in the Appendix.

SUMMARY OF ARGUMENT

The words "Abu Ghraib" conjure horrific images that have left a deep stain on this nation's honor and

[1] Counsel of record received at least ten days notice of the intent to file this brief. Electronic messages from all counsel consenting to its filing are being sent with this brief to the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person other than *amicus curiae* or their counsel made a monetary contribution to the preparation and submission of this brief.

reputation. Petitioners in this case allege that Titan Corp. is partially responsible for the abuses committed at Abu Ghraib. The D.C. Circuit attempted to shield Titan from liability by invoking a new federal common law immunity defense that has no basis in any federal statute or Supreme Court decision. The Supreme Court should grant the petition for certiorari. If Titan is going to escape liability for its role in the Abu Ghraib scandal, it should not be because a lower federal court created a new judge-made defense that extends the federal government's sovereign immunity to private contractors, in contravention of clear statutory text denying immunity to those contractors.

Petitioners in this case raised state tort law claims as well as federal common law claims under the Alien Tort Statute (ATS). This brief addresses only the ATS claims. The D.C. Circuit rejected petitioners' ATS claims for two reasons. The Court held, first, that petitioners failed to state a valid claim under the ATS because the law of nations does not bind private actors, and second, that their ATS claims are preempted by the government contractor defense. This brief does not address the question whether the law of nations binds private actors. This *amicus* brief demonstrates that – assuming petitioners have a valid claim against Titan under the ATS – there is no recognized affirmative defense barring that claim.

If Titan has a valid affirmative defense to petitioners' ATS claims, it must either be a statutory

defense or a federal common law defense. The only relevant statutory defense is the sovereign immunity defense codified in the Federal Tort Claims Act (FTCA). However, the FTCA expressly denies sovereign immunity to private contractors, such as Titan. Therefore, Titan has no statutory defense because it is not shielded by the government's sovereign immunity. The only relevant common law defense is the government contractor defense announced by this Court in *Boyle v. United Technologies Corp.* However, *Boyle* establishes a preemption defense, not an immunity defense. Federal preemption defenses apply only to state law claims, not federal claims. Even assuming that the government contractor defense bars petitioners' state law claims, it cannot bar petitioners' ATS claims because those are federal common law claims. A federal common law defense cannot "preempt" a federal common law claim: the doctrine of preemption is simply inapplicable in this context.

The D.C. Circuit relied on a new, never-before-recognized federal common law immunity defense by mixing elements of federal sovereign immunity with the *Boyle* preemption defense. This Court should not countenance the lower court's attempt to create a new judge-made immunity defense to shield Titan from liability for the egregious war crimes committed at Abu Ghraib. Neither the statutory sovereign immunity defense nor the common law government contractor defense bars petitioners' ATS claims.

ARGUMENT

I. Federal Sovereign Immunity Does Not Shield Titan from Liability

Almost two centuries ago, Chief Justice Marshall declared "that no suit can be commenced or prosecuted against the United States" without its consent. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-12 (1821). This Court has affirmed this principle in numerous cases since then. *See, e.g.*, *United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. Lee*, 106 U.S. 196, 205 (1882); *Hill v. United States*, 50 U.S. (9 How.) 386, 389 (1850); *see also* Larry W. Yackle, Federal Courts 411-17 (3rd ed. 2009) (discussing federal sovereign immunity). However, this Court has never held that the federal government's sovereign immunity shields private contractors from liability for tortious conduct.

Congress codified the rules governing federal sovereign immunity by enacting the Federal Tort Claims Act (FTCA) in 1946. Pub. L. No. 79-601, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C.). The original statute stated that the term "'Federal agency' includes the executive departments and independent establishments of the United States . . . *Provided*, That this shall not be construed to include any contractor with the United States." § 402(a), 60 Stat. at 842-43. By specifically excluding government contractors from the definition of "federal agency," Congress made it abundantly clear that the federal government's sovereign

immunity does not shield private contractors from liability for tortious conduct. This statutory rule codified the understanding that has prevailed since Marshall's time: federal sovereign immunity protects the federal government, not government contractors.

In the present case, the D.C. Circuit stated that Titan would be protected by sovereign immunity if it "acted under color of law." *Saleh v. Titan*, 580 F.3d 1, 15-16 (D.C. Cir. 2009). The FTCA specifies that "the term 'Federal agency' includes . . . corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States." 28 U.S.C. § 2671 (2006). Thus, the D.C. Circuit's statement implies that, if Titan was acting under color of law, it would be covered by the statutory reference to "corporations primarily acting as instrumentalities or agencies." *Id.* However, nothing could be further from the truth.

It is instructive to compare the present case to *United States v. Orleans*, 425 U.S. 807 (1976). *Orleans* presented the question whether the Warren-Trumbull Council for Economic Opportunity, Inc., a nonprofit corporation, was "a federal instrumentality or agency for purposes of Federal Tort Claims Act liability." *Id.* at 809. It was undisputed that the Warren-Trumbull Council "was created for the purpose of carrying out" a federal statutory program; "received no funds from any source other than the" federal government; and "conducted only programs formulated and funded by the federal government." *Id.* at 811 (internal quotations omitted). In short, the

corporation in *Orleans* was entirely dependent on federal funding and its sole mission was to implement federal programs. Even so, the Court held that it was not a federal agency or instrumentality within the meaning of the FTCA. *Id.* at 819.

In contrast to the Warren-Trumbull Council, Titan is a genuine independent contractor, not a corporation created for the purpose of implementing federal programs. In March 2005, more than a year after the key events at Abu Ghraib, Titan pled guilty to violating the Foreign Corrupt Practices Act for "making $2.1 million in payments to the election campaign of Mathieu Kerekou, president of the West African nation of Benin." Paul Burnham Finney, *Itineraries; Shaking Hands; Greasing Palms*, New York Times, May 17, 2005. Shortly thereafter, L-3 Communications acquired Titan "for about $2 billion in cash." Andrew Ross Sorkin, *L-3 to Acquire Titan, Expanding Share of Military Market*, New York Times, June 4, 2005. L-3 Communications was formed in 1997 when Lockheed Martin decided to form "an independent company out of 10 noncore high-technology business units . . . [that] produce products and components for communications customers." Company News; *Lockheed Martin Units Becoming Independent Company*, New York Times, Feb. 4, 1997. According to L-3's own web site, the company provides products and services not only to the U.S. Government, but also "to military and commercial customers in several diverse niche markets" and to "allied foreign governments." L-3

Communications, Electronic Systems, http://www.l-3com.com/business-segments/businesssegments.aspx?id=4 (last visited May 20, 2010); L-3 Communications, Government Services http://www.l-3com.com/business-segments/businesssegments.aspx?id=3 (last visited May 20, 2010). In sum, L-3 Communications, which now owns Titan, was not created for the purpose of carrying out federal programs; it receives funds from a variety of sources other than the federal government; and it conducts numerous activities that are not federally funded.[2] Given that the Warren-Trumbull Council, the corporation at issue in *Orleans*, was not a federal agency or instrumentality for purposes of the FTCA, it necessarily follows that L-3/Titan does not qualify as a federal agency or instrumentality under the FTCA. Therefore, contrary to the D.C. Circuit's suggestion, even if Titan was acting under color of law – a point on which *amici* offer no opinion – Titan would still not have a viable sovereign immunity defense under the FTCA.

The D.C. Circuit mistakenly relied on its own prior decision in *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), to support its conclusion that Titan would be entitled to sovereign immunity if it was acting under color of law. *See Saleh*, 580 F.3d at 15-16. In *Sanchez-Espinoza*, plaintiffs raised claims under the ATS against President Reagan, the

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[2] Under Rule 201 of the Federal Rules of Evidence, this Court is entitled to take judicial notice of the facts about L-3 and Titan summarized in this paragraph.

Secretary of State, the Secretary of Defense, the CIA Director, and other senior U.S. government officials. *Sanchez-Espinoza*, 770 F.2d at 205 n.1. Then-Judge Scalia, writing for the court, held that ATS claims for money damages against government officials for actions taken in their official capacities were barred by federal sovereign immunity. *Id.* at 207. However, *Sanchez-Espinoza* did not involve any claim against a private military contractor.[3] Therefore, *Sanchez-Espinoza* provides no support for Titan's argument that it is entitled to sovereign immunity under the FTCA.

II. The Government Contractor Defense Does Not Apply to Petitioners' ATS Claims

The D.C. Circuit relied heavily on this Court's decision in *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988), to support its holding that petitioners' state

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[3] Plaintiffs in *Sanchez-Espinoza* did raise claims against "two organizations – Alpha 66, Inc., and Bay of Pigs Veterans Association, Brigade 2506, Inc. – which are alleged to operate paramilitary training camps in the United States." 770 F.2d at 205. The court said in a footnote that, insofar as those organizations "were acting as agents of the United States . . . their actions are arguably brought within . . . our ensuing analysis pertaining to action by officers of the United States," thereby implying that those organizations might be shielded by the government's sovereign immunity. *Id.* at 207 n.4. However, the court did not hold that the two named organizations were entitled to sovereign immunity, nor did it state or imply that private contractors are entitled sovereign immunity under the FTCA.

tort law claims are preempted by the government contractor defense. *See Saleh*, 580 F.3d at 5-13. In that context, the lower court correctly noted that the government contractor defense is a preemption defense, not an immunity defense. *See id.* at 5 ("[P]laintiffs' D.C. tort law claims are preempted. . . ."); *id.* at 7-8 ("[A] significant conflict exists between the federal interests [at stake] and D.C. tort law. . . ."); *id.* at 7 ("[T]he instant case presents us with a more general conflict preemption. . . ."). Similarly, this Court in *Boyle* made clear that the government contractor defense is a preemption defense, not an immunity defense. *See Boyle*, 487 U.S. at 504 (noting that certain "areas, involving uniquely federal interests, are so committed . . . to federal control that state law is pre-empted and replaced, where necessary, by federal law" (internal quotations and citation omitted)); *id.* at 507 (noting that preemption occurs where "a significant conflict exists between an identifiable federal policy or interest and the operation of state law" (internal quotations and citation omitted)); *id.* at 512 ("[S]tate law which holds Government contractors liable for design defects in military equipment does in some circumstances present a significant conflict with federal policy and must be displaced."). Indeed, the Court in *Boyle* explicitly rejected the dissent's allegation that the Court was extending "the immunity of federal officials . . . to nongovernment employees." *Id.* at 505 n.1.

After holding that the government contractor defense preempted petitioners' state law claims, the D.C. Circuit in *Saleh* went on to hold that the same government contractor defense preempted petitioners' ATS claims. *Saleh*, 580 F.3d at 16 ("If we are correct in concluding that state tort law is preempted on the battlefield . . . the application of international law to support a tort action on the battlefield must be equally barred."). Unfortunately, the lower court's analysis conflates the fundamental distinction between a preemption defense and an immunity defense. Immunity defenses apply only to particular types of defendants. State sovereign immunity protects state governments and agencies. *See, e.g.*, *Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). Federal sovereign immunity protects the federal government and its agencies. *See* 28 U.S.C. § 2671. Foreign sovereign immunity protects foreign governments. *See* 28 U.S.C. § 1604; *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193 (2007). Official immunity doctrines protect government officers. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In sum, the availability of an immunity defense hinges on the identity of the defendant.

In contrast, the availability of a preemption defense does not depend on the identity of the defendant; it hinges on the existence of some type of conflict between federal law and state law. Typically, a defendant raises a federal preemption defense in response to a state law claim. *See, e.g.*, *Wyeth v.*

Levine, 129 S.Ct. 1187 (2009); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996). *Amici* are not aware of any case in which this Court has upheld a federal preemption defense to a *federal* claim.

This Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), makes clear that plaintiffs' ATS claims are federal claims, not state law claims. Under the *Sosa* framework, "the norm that is enforced in ATS litigation comes from international law . . . [but] domestic, federal common law" provides the source of the plaintiff's private right of action. William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 Rutgers L. J. 635, 639 (2006). Hence, ATS claims are properly characterized as federal common law claims, inasmuch as the right of action is a creature of federal common law. *See Sosa*, 542 U.S. at 729 (noting that the Alien Tort Statute is one of the "limited enclaves in which federal courts may derive some substantive law in a common law way"); *id.* at 732 (stating that federal courts may "recognize private claims under federal common law for violations of . . . international law norm[s]"); *see also* Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 Harv. L. Rev. 869, 873 (2007) ("The Court in *Sosa* held that the ATS authorized federal courts to recognize federal common law causes of action for a narrow class of CIL violations."); Beth Stephens, *Sosa v. Alvarez-Machain: The Door is Still Ajar for Human Rights Litigation in U.S. Courts*, 70 Brooklyn L. Rev.

533, 556 (2004-05) ("*Sosa* confirmed that federal courts adjudicate ATS claims as an exercise of their power to recognize federal common law claims for violations of certain international law norms."). Since the government contractor defense is a federal preemption defense, *see Boyle*, 487 U.S. at 504-12, and since federal preemption defenses apply only to state law claims, not federal claims, Titan cannot invoke the government contractor defense to defeat petitioners' federal common law claims under the ATS.

The D.C. Circuit tried to circumvent this problem by noting that "federal executive action is sometimes treated as 'preempted by legislation,'" *Saleh*, 580 F.3d at 16, thus suggesting, by way of analogy, that a federal statute could preempt petitioners' federal common law claims. *Amici* agree that, in theory, a federal statutory defense could defeat a federal common law claim. A federal defense can preempt a state law claim because federal law is hierarchically superior to state law under the express terms of the Supremacy Clause. U.S. Const. art. VI. *See* Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 250-54 (2000). For similar reasons, a federal statutory defense can defeat a federal common law claim because a federal statute is hierarchically superior to federal common law. *See, e.g.*, *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 313 (1981) ("We have always recognized that federal common law is 'subject to the paramount authority of Congress.'") (quoting *New Jersey v. New York*, 283 U.S. 336, 348 (1931)); *see also Illinois v. City of Milwaukee*, 406 U.S. 91, 107 (1972)

("[N]ew federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance."). However, as discussed above, Titan does not have a viable statutory defense under the FTCA. *See* Part I, *supra*. Moreover, there is no other federal statute that provides Titan a viable defense to petitioners' ATS claims.

Broadly speaking, any viable preemption defense relies on the *lex superior* principle. That principle states that a conflict between a higher-ranking law and a lower-ranking law must be resolved in favor of the higher-ranking law. Thus, a preemption defense is available if, and only if, a defendant can identify a conflict between a lower-ranking law that provides the basis for a plaintiff's claim and a higher-ranking law that shields defendant from liability. Titan has failed to identify any such conflict in this case. As noted above, this Court's decision in *Sosa* makes clear that petitioners' ATS claims are federal common law claims. *See Sosa*, 542 U.S. at 729-32. Similarly, this Court's decision in *Boyle* makes clear that the government contractor defense is a federal common law defense. *See Boyle*, 487 U.S. at 504 ("[S]tate law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts – so-called 'federal common law.'"). Hence, assuming that there is a conflict between petitioners' ATS claims and the government contractor defense – a question on which *amici* express no view – it would be a conflict between one federal common law rule and another federal

common law rule. Clearly, there is no hierarchical, *lex superior* relationship between two federal common law rules. Therefore even if the government contractor defense bars petitioners' state law claims, that defense cannot bar petitioners' ATS claims because the federal common law rule creating the government contractor defense is not hierarchically superior to petitioners' federal common law causes of action under the ATS.

The D.C. Circuit attempted to skirt this insurmountable problem by suggesting that Titan's preemption defense is "drawn from congressional stated policy" embodied in the FTCA. *Saleh*, 580 F.3d at 16. However, for the reasons noted above, the FTCA itself does not provide Titan a statutory defense to any of petitioners' claims because the FTCA protects only government defendants, not private contractors. Moreover, absent a statutory defense, the most that Titan can squeeze out of the FTCA is a federal common law defense based on congressional policies; this is the government contractor defense associated with *Boyle*. But that federal common law defense cannot defeat petitioners' federal common law claims because there is no *lex superior* relationship between the government contractor defense and the ATS claims.

In sum, the D.C. Circuit attempted to shield Titan from liability by invoking a new, never-before-recognized federal common law immunity defense

that blends elements of the *Boyle* preemption defense with the statutory sovereign immunity defense codified in the FTCA. However, federal courts are not free to create new defenses by mixing ingredients the way a bartender mixes drinks. Titan does not have a viable sovereign immunity defense under the FTCA because it is a government contractor, not a government agency. Titan does not have a viable preemption defense under *Boyle* because petitioners' ATS claims are federal claims, not state claims. This Court should firmly reject the D.C. Circuit's misguided attempt to shield Titan from liability by blending elements of two recognized affirmative defenses, neither one of which, by itself, provides Titan a viable defense to petitioners' ATS claims.

CONCLUSION

This Court should grant the petition for certiorari. The Court should not permit a lower federal court to create a new federal common law defense for the sole purpose of immunizing Titan from liability for the egregious torts committed by its employees at Abu Ghraib.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

HAIDAR MUHSIN SALEH,
ILHAM NASSIR IBRAHIM, *et al.*,

PETITIONERS,

v.

CACI INTERNATIONAL
AND TITAN CORPORATION,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICI CURIAE* RETIRED MILITARY OFFICERS IN SUPPORT OF PETITIONERS

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STATEMENT OF *AMICI*[1]

Amici are retired military officers who have held senior command positions in the U.S. Armed Forces. Consistent with their fidelity to the laws of armed conflict, they maintain a strong interest in continuing this Nation's long tradition of according humane treatment to detainees captured during wartime. With a wealth of experience regarding the practical realities of combat operations abroad, *amici* provide a unique perspective on the relationship between, and respective responsibilities of, U.S. military personnel and private military contractors hired to assist them.

Amici write because they are deeply concerned about the rule emerging from this case: that persons engaging in shocking behavior that the U.S. military does not itself tolerate for its own members have broad impunity from accountability. Specifically, *amici* disagree with the court of appeals' conclusion that private military contractors are the functional equivalent of uniformed U.S. soldiers because that conclusion is inconsistent with the law of war and expert military judgment. Although *amici* recognize that civilian contractors often perform vital functions in support of U.S. military operations, they

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[1] The parties have consented to the filing of this brief. Counsel of record for both parties received notice at least ten days prior to the due date of *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief.

maintain that the law should not blur the well-settled distinction between civilian contractors and "combatants" because doing so would undermine the United States' commitment to humane treatment of prisoners in our custody and ultimately weaken the reputation and strength of this country's armed forces.

Brigadier General David M. Brahms served in the Marine Corps from 1963 through 1988, with a tour of duty in Vietnam. During the 1970s, he served as the principal legal advisor for POW matters at Headquarters Marine Corps, and in that capacity, he was directly involved in issues relating to the return of American POWs from Vietnam. General Brahms was the senior legal advisor for the Marine Corps from 1985 through 1988, when he retired. He is currently in private practice in California and was formerly a member of the Board of Directors of the Judge Advocates Association.

James P. Cullen is a retired Brigadier General in the U.S. Army Reserve Judge Advocate General's Corps and last served as the Chief Judge (IMA) of the U.S. Army Court of Criminal Appeals. He currently practices law in New York City.

Rear Admiral Donald J. Guter was a line officer in the U.S. Navy from 1970 through 1974. After law school, he served in the Navy from 1977 until he retired in 2002. From June 2000 through June 2002, Admiral Guter was the Navy's Judge Advocate General. Admiral Guter is now President and Dean of South Texas College of Law in Houston, Texas.

Rear Admiral John D. Hutson was commissioned in the U.S. Navy in 1969. After law

school, he served in the Navy from 1972 until he retired in 2000. From 1994 until 1996, Admiral Hutson served as the Commanding Officer, Naval Legal Service Office, Europe and Southwest Asia. Admiral Hutson served as the Navy's Judge Advocate General from 1997 until 2000. Admiral Hutson is now Dean and President of Franklin Pierce Law Center in Concord, New Hampshire.

SUMMARY OF ARGUMENT

This case arises out of one of most shameful episodes in our Nation's otherwise honorable military history—an episode that damaged our country's hard-earned reputation for lawful and humane treatment of wartime detainees. The torture and abuse of prisoners at Abu Ghraib was rightly condemned by President Bush, former Secretary of Defense Rumsfeld, and a number of independent military and civilian investigators. Numerous military personnel were sanctioned, and even imprisoned, for the abuse and torture of detainees. Yet, despite evidence of similar, unlawful conduct undertaken by private military contractors, including by employees of the Respondents, no civilians have yet been held accountable for their role in the Abu Ghraib scandal.

In granting Respondents immunity from suit, the court of appeals erroneously treated these civilian contractors as if they were combatants entitled to invoke a provision of the Federal Tort Claims Act ("FTCA") that bars damages suits for the "combatant activities" of the "military or naval forces or the Coast Guard." 28 U.S.C. § 2680(j). The court reasoned that these contractors were functionally equivalent to U.S. soldiers because they were "integrated" into a "common mission" with the U.S. military, under "ultimate military command," and "subject to military direction." *Saleh v. Titan*, 580 F.3d 1, 6-7 (D.C. Cir. 2009). As *amici* know well, however, merely performing military functions and

taking commands from military officers does not transform a civilian into a soldier.

Rather, under the governing provisions of the Geneva Conventions, "combatants" have a distinct and meaningful legal status. Civilian contractors cannot be considered "combatants," nor can they lawfully engage in "combatant activities," because they are not fully incorporated into the armed forces of a state party to the Conventions (such as the United States) or subject to a military chain of command. Interpreting "combatant" in a manner that is divorced from this well-settled law of armed conflict threatens to erode a distinction foundational to the entire architecture of humanitarian law: that warfare be conducted only by genuine combatants trained in the law of war and subject to discipline through a responsible chain of command.

In addition, the Department of Defense has promulgated numerous regulations setting forth a clear legal and policy demarcation between civilian contractors on the one hand and U.S. soldiers on the other. By conflating contract employees with U.S. soldiers, the court of appeals erroneously substituted its judgment for the expertise of the military.

Finally, membership in the armed forces carries with it unique responsibilities. Soldiers are subject to rigorous training and discipline, and are at all times accountable to the military chain of command. At the same time, military commanders, as representatives of a government entity, are ultimately accountable to the American people for the behavior of soldiers under their command. In view of this comprehensive and distinctive system of justice and political accountability, it makes sense

for Congress to have exempted the "combatant activities" of U.S. military personnel from tort law liability. But given that employees of civilian contractors indisputably are not subject to the military chain of command, and therefore cannot be disciplined or held accountable by the military, it makes little sense to extend to them such absolute tort law immunity for their misconduct.

If Congress wishes to extend wartime immunities to persons who are not genuine combatants, it is of course free to do so by amending the relevant provision of the FTCA. Absent action by the political branches to alter our country's systems of liability, however, the lower court's judicially-created immunity for unlawful conduct by private contracting companies is inappropriate.

ARGUMENT

I. THE COURT OF APPEALS' TREATMENT OF CIVILIAN CONTRACTORS AS THE FUNCTIONAL EQUIVALENT OF U.S. SOLDIERS IS INCONSISTENT WITH BOTH THE LAW OF WAR AND U.S. MILITARY POLICY.

A. The Court of Appeals Should Have Interpreted the "Combatant Activities" Provision of the FTCA in a Manner Consistent with the Law of War.

The court of appeals concluded that civilian employees of private military contractors are covered

by the provision of the FTCA, which creates an exception to the statute's waiver of sovereign immunity for "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard during time of war." 28 U.S.C. § 2680(j). That conclusion was inconsistent with the law of war—also referred to as the law of armed conflict or international humanitarian law—which regulates the methods of waging war and sets forth protections due to persons caught in such conflicts. *See* U.S. Dep't of the Army, *Field Manual 27-10: The Law of Land Warfare*, ¶¶ 2-3 (July 18, 1956) ("Land Warfare Manual").

This body of international law is founded primarily upon the four Geneva Conventions[2] and upon the customary international law derived over time from the common practices of nations. *Id.* at ¶¶ 4, 6. In the wake of World War II, the United States played a leading role in the codification of rules governing humanitarian conduct in wartime, in large part to "enable [the United States] to invoke

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[2] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 ("GC I"); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 ("GC II"); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("GC III"); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 ("GC IV").

them for the protection of our nationals" in future conflicts.[3]

Since the Founding of the Republic, treaties and customary international law have been recognized as "part of" U.S. law. *The Paquette Habana*, 175 U.S. 677, 700 (1900); U.S. Const., art. VI, cl. 2. This Court has therefore repeatedly ruled that U.S. law should be construed in a manner consistent with the law of nations. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any possible construction remains."). In particular, the Court has instructed that the law of war is to be considered when defining legal obligations due to "combatants" held in U.S. custody, *Ex parte Quirin*, 317 U.S. 1, 27-28 (1942); *Hamdi v. Rumsfeld*, 542 U.S. 507, 520-21 (2004) (plurality opinion), and has looked to the law of war to inform the meaning of disputed statutory terms related to armed conflict, such as those included in the Authorization for the Use of Military Force, *Hamdi*, 542 U.S. at 520-22, and the Uniform Code of Military Justice, *Hamdan v. Rumsfeld*, 548 U.S. 557, 613 (2006). Accordingly, the "combatant activities" provision of the FTCA, which expressly relates to conduct in a theater of armed conflict, should be interpreted in a manner consistent with the law of war.

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[3] *Geneva Conventions for the Protection of War Victims: Hearing Before the Senate Comm. on Foreign Relations*, 84th Cong., 1st Sess. 3-4 (1955) (Statement of Secretary of State Dulles).

Under the law of war, civilian contractors cannot be considered combatants, nor can they lawfully engage in "combatant activities." The Commentary to the Fourth Geneva Convention explains that "[e]very person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, [or] a civilian covered by the Fourth Convention." ICRC, *The Geneva Conventions of 12 August 1949: Commentary to the IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 51 (Jean S. Pictet ed., 1958) ("Commentary to GC IV").[4] In a theater of armed conflict, a civilian contractor cannot be transformed into a soldier even when he is "integrated into the military's operational activities" or "performing a common mission . . . under ultimate military command." *Compare Saleh*, 580 F.3d at 6-7. Under the law of war, "*[t]here is no* intermediate status." *Commentary to GC IV* (emphasis in original).

The Third Geneva Convention sets out the humanitarian protections due to privileged combatants, or what are commonly known as prisoners of war ("POWs"). Under Article 4 of the Third Convention, POW status is authorized for "[m]embers of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces." GC III, art. 4(A)(1). Persons who are not members of a

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[4] The armed conflict in Iraq, the theater of war in which the alleged torture and abuses at issue arose, is governed by the Geneva Conventions. *See* GC I, art. 2; GC II, art. 2; GC III, art. 2; GC IV, art. 2.

state's armed forces—*i.e.*, "[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements," GC III, art. 4(A)(2)—may still be regarded as combatants entitled to POW status if they possess four key attributes of membership in a state's regular armed forces.[5]

Civilian contractors appear to fall under GC III, Article 4(A)(4), which covers logistical support personnel accompanying armed forces. However, while all individuals described in GC III Article 4(A)(1)-(6) receive POW status, only those in GC III Article 4(A)(1)-(3) and (6) are considered combatants. *See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, June 8, 1977, 1125 U.N.T.S. 3, art. 50(1) ("AP I"). Those described in Articles 4(A)(4) and (5)—that is, contractors accompanying the military—thus remain civilians under the Geneva Conventions. *Id.*; ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, art. 43, at ¶ 1677 (Yves Sandoz, et al. eds., 1989) ("[O]nly members of the armed forces are combatants. This should therefore dispense with the concept of 'quasi-combatants'. . . ."). Accordingly, under governing "longstanding law-of-war principles," *see Hamdi*, 542 U.S. at 521, the term "*combatant activities* of the military or naval forces,

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[5] GC III, art. 4(A)(2) provides that a member of a militia may be a combatant when he is "commanded by a person responsible for his subordinates," wears "a fixed distinctive sign recognizable at a distance," carries "arms openly" and conducts "operations in accordance with the laws and customs of war."

or the Coast Guard during time of war," 28 U.S.C. § 2680(j) (emphasis added), cannot be interpreted to cover civilian contractors such as the Respondents in this case.

The law of war not only sets out the precise—and binding—obligations of parties to an armed conflict, equally important, these rules also seek to further broader humanitarian principles and thus protect all persons, including U.S. soldiers, in a theater of war. Specifically, by privileging (*i.e.*, authorizing) certain kinds of behavior when armed conflict occurs, the law of war creates incentives for such conflicts to be conducted humanely. The law of war recognizes that if conflict must happen, it should be undertaken only by soldiers of a regular state army or other specified militia members who themselves abide by the law of war and are subject to a responsible chain of command. *See* GC III, arts. 4(A)(1)-(3). Combatants (as defined by GC III) are permitted to engage in hostilities against other combatants and to utilize lethal force without fear of criminal prosecution for their acts, provided that they observe the law of war. *See* GC III arts. 87, 99; AP I, art. 43(2). Further, lawful combatants who are captured are denominated POWs and are entitled to a host of additional legal and humanitarian protections not available to noncombatants (civilians) who engage in unprivileged belligerency. *See, e.g.*, GC III, Parts II-V.

At the same time, civilian status is also privileged and protected, albeit in different ways. Civilians who do not participate in hostilities cannot be targeted with force. *See* GC I, art. 3(1); GC II, art. 3(1); GC III, art. 3(1). But a civilian who acts as a

combatant and engages in direct hostilities loses his immunity from attack. *See id.* Because engaging in hostilities by persons not subject to a responsible command is disfavored, these civilians are treated as unprivileged belligerents and are thus denied POW protections and the immunity from prosecution provided to lawful combatants.[6]

Maintaining a strict distinction between combatants and civilians thus promotes the "principle of distinction"—referred to as "the grandfather of all principles" upon which humanitarian law is founded—which provides "that military attacks should be directed at combatants and military property, and not civilians or civilian property." U.S. Army Judge Advocate General's Legal Ctr. & Sch., *Law of War Handbook* 166 (2005) ("JAG Law of War Handbook"). Under this law-of-war principle, combatants should know that they can be punished for attacking civilians and civilians should know that they lose protection from attack if they participate in hostilities; with those lines drawn, hostilities should be limited to only genuine combatants—*i.e.*, members of the regular armed forces of a state—and not civilians, such as Respondents in this case.

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[6] HCJ 769/02 Pub. Comm. Against Torture in Israel v. Israel [2005] ¶¶ 31-40; Knut Dörmann, *The Legal Situation of "Unlawful/Unprivileged Combatants,"* 85 Int'l Rev. Red Cross 45, 46-47 (2003).

B. In the U.S. Military's Expert Judgment, Civilian Contractors Should Not Be Treated as Combatants.

In accordance with the law of war, U.S. military regulations also establish a clear and meaningful distinction between combatants on the one hand and civilians on the other—a distinction that does not support the court of appeals' conclusion that the two are functionally equivalent. Army regulations implementing law-of-war principles expressly recognize that "[c]ontractors and their employees are not combatants, but civilians" and specifically prohibit contractors from engaging in any activity that would "jeopardize" their status as civilians. U.S. Dep't of the Army, *Field Manual 3-100.21 (100-21): Contractors on the Battlefield*, ¶ 1-21 (Jan. 2003) ("Field Manual on Contractors").

For example, the Department of Defense has recognized that contingency contractors are "civilians accompanying the force" who are barred from "inherently governmental" functions and duties. U.S. Dep't of Defense, *Instruction 3020.41: Contractor Personnel Authorized to Accompany the U.S. Armed Forces*, ¶¶ 6.1.1, 6.1.5 (Oct. 3, 2005). The Department of Defense has also expressly stated that in relying upon contractors, "the Government is not contracting out combat functions." Defense Federal Acquisition Regulation Supplement; Contractor Personnel Authorized to Accompany U.S. Armed Forces, 73 Fed. Reg. 16,764-65 (Mar. 31, 2008) (to be codified at 48 C.F.R. pt. 212, 225, and 252).[7]

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[7] Respondents had a similar understanding. *See Saleh*, 580 F.3d at 33 n.28 (Garland, J., dissenting) (quoting CACI

Moreover, the military recognizes that by limiting combat to organized armies, the law of war promotes a vital system of command responsibility. *See, e.g.*, AP I, art. 43; *Land Warfare Manual*, ¶ 501. Specifically, the military chain of command exposes combatants to the sanctions of both international law and domestic military discipline, and ensures that military superiors are also held responsible by virtue of their command responsibility. *Id.* These enforceable disciplinary procedures, as well as training in the law of armed conflict, make it less likely that violations of the law of war will occur—as they did at Abu Ghraib—than if non-accountable persons engage in combatant activities. Military leaders like *amici* recognize that maintaining systems of accountability and clear command responsibility is thus critical to the U.S. military's lawful participation in any armed conflict. Likewise, military leaders like *amici* firmly believe that fidelity to law-of-war principles furthers the United States' commitment to humane treatment, and ultimately preserves the hard-earned reputation and strength of this country's armed forces.

In creating a novel judicial extension of the "combatant activities" provision of the FTCA to cover civilian contractors, the court of appeals ignored meaningful distinctions between combatants and civilians embodied in humanitarian law principles, as well as the experienced judgment of the U.S. military. Given the importance of these principles to

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Statement of Work, which states that CACI's employees "are considered non-combatants").

the strength of the armed services, *amici* urge this Court to review the lower court's decision.

II. THE COURT OF APPEALS' RULING GRANTING CIVILIAN CONTRACTORS CATEGORICAL CIVIL LAW IMMUNITY FOR "COMBATANT ACTIVITIES" FAILS TO APPRECIATE THE SIGNIFICANCE OF THE MILITARY CHAIN OF COMMAND AND CREATES A DANGEROUS GAP IN ACCOUNTABILITY FOR UNLAWFUL ACTIVITY, INCLUDING TORTURE.

Membership in the U.S. Armed Forces carries with it significant privileges but also heavy obligations, foremost among them being respect for the law of war and for the military chain of command. These cornerstones of the modern American Armed Forces reflect a culture and tradition that demands rigorous training, discipline and accountability. But private military contractors, by contrast, are no more than corporate entities, whose activities are governed only by contractual relationships with the military and who are primarily accountable to private shareholders. Because they are not subjected to the same standards of accountability as are members of the military, private contractors do not merit the immunity afforded to sovereign governmental entities, now provided to them by the decision of the court of appeals.

A. Civilian Contractors, Unlike Members of the U.S. Armed Forces, Are Not Subject to a System of Discipline, Training and Accountability, Which Is at the Core of the Military Chain of Command.

All members of the U.S. Armed Forces adhere to a strict chain of command. At the top of the chain is the constitutionally mandated—and long-standing tradition—of civilian control of the military. *See* U.S. Const. art. I, §8 (congressional power to declare war); art. II, §2 (President of United States is "commander in chief" of the Army and Navy). At the lower end of the chain, soldiers are subject to an elaborate system of discipline and training that obligates them to follow the commands of superior officers upon pain of punishment or discharge. *See United States v. Brown*, 348 U.S. 110, 112 (1954) (recognizing the "peculiar and special relationship of the soldier to his superiors").

As this Court has recognized, the military imposes "overriding demands of discipline and duty," *Burns v. Wilson*, 346 U.S. 137, 140 (1953), which become especially "imperative in combat," *Chappell v. Wallace*, 462 U.S. 296, 300 (1983). Over the centuries, a unique "hierarchical structure of discipline and obedience to command . . . wholly different from civilian patterns" has developed, which ensures that combatant activities are performed in accordance with the law of war. *Id.*

Specifically, soldiers who disobey orders, unlike civilian contractors who may accompany soldiers on the field, are routinely subject to discipline and punishment under the Uniform Code

of Military Justice ("UCMJ"), art. 90, 10 U.S.C. § 890. Indeed, eleven of the soldiers involved in the torture of prisoners at Abu Ghraib have been convicted by courts-martial for offenses ranging from dereliction of duty to assault. Ben Nuckols, *Abu Ghraib Probe Didn't Go Far Enough*, ARMY TIMES, Jan. 13, 2008; Eric Schmitt & Kate Zernike, *Abuse Convictions in the Abu Ghraib Prison Abuse Cases, Ordered by Date*, N.Y. Times, Mar. 22, 2006. Between October 2001 and March 2006, 251 officers and enlisted soldiers were punished in some fashion for mistreating prisoners. Eric Schmitt, *Iraq Abuse Trial Is Again Limited to Lower Ranks,* N.Y. Times, Mar. 23, 2006. Likewise, the military has sanctioned officers administratively, by reassignment or even demotion. *Id.* But significantly, the military simply cannot exercise the same authority over Respondents' employees because it lacks the legal authority to do so.

Just as important to the proper functioning of the military chain of command is the duty that commanders owe to subordinates. Command responsibility "is the legal and ethical obligation a commander assumes for the actions, accomplishments, or failures of a unit." U.S. Dep't of the Army, *Field Manual 101-5: Staff Organization and Operations*, 1-1 (May 31, 1997). Because the doctrine of command responsibility mandates that commanders have an affirmative duty to prevent the commission of war crimes, they can be court-martialed in dereliction of duty for failure to do so. *See* 10 U.S.C. § 892.

As Judge Garland explained in his dissenting opinion, private military contractors, such as the

Respondents in this case, are decidedly not part of the military chain of command, nor are they actually subject to "ultimate military command" in any meaningful sense. *Saleh*, 580 F.3d at 22-24, 34. Military commanders can only direct the activities of contractor companies through the terms of a contract. And because employees of contractors owe no duty to a military commander comparable to that of a soldier, contractor employees may contravene or ignore a military officer's orders while suffering only the consequences of potential termination, including any penalties for breach of contract.

Moreover, the Army Field Manual expressly recognizes that "contractor employees are not the same as government employees" and that "only contractors manage, supervise, and give directions to their employees." *Field Manual on Contractors*, ¶ 1-22 (2003). The military thus recognizes that employees of private military contractors are not subject to military discipline and "[c]ommanders have no penal authority to compel contractor personnel to perform their duties." *Id.* at ¶ 4-45; *see also* Joint Chiefs of Staff, *Joint Publication 4-0: Doctrine for Logistic Support of Joint Operations*, V-8 (2000) ("[c]ontract employees are disciplined by the contractor"). Titan's contract with the U.S. Army confirms this understanding.[8]

In contrast, a private military contractor presumptively owes a higher duty of care to its

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[8] *Saleh*, 580 F.3d at 33 n.28 (Garland, J., dissenting) ("[p]ersonnel performing work under this contract shall remain employees of the Contractor and will not be considered employees of the Government") (quoting Titan contract).

shareholders than to a military officer or the U.S. government. The lower court's observation that private military contractors "were subject to military direction, even if not subject to normal military discipline," 580 F.3d at 7, thus reveals a misapprehension of the fundamental legal and moral difference between contractual obligations and command responsibility, and correspondingly, between civilian and combatant status. It is only the military chain of command, enforced through "normal military discipline," *id.*, which ensures that our soldiers obtain the privileges of genuine combatant status under the law of war. *See supra* Point I(A). Being subject to this system of military accountability likewise entitles members of the military to immunity from a system of civilian liability for "combatant activities" during "time of war." 28 U.S.C. § 2680(j). Indeed, insistence upon high standards and accountability is what distinguishes our fighting forces from mercenaries or unlawful combatants and is what gives our soldiers moral license to take human life on this country's behalf.

In view of this unique system of training, responsibility and justice, it makes sense for Congress to have exempted under the FTCA those subject to a military chain of command from state law tort liability. That logic does not similarly or legally extend to the contractors who work for the military or their employees.

B. Exempting Civilian Contractors from Basic Liability Rules Provides Corporate Actors Unwarranted Impunity for Unlawful Activity, Including Torture.

The decision of the court of appeals not only misapprehends the unique obligations of U.S. military service, it also sanctions a troubling—and anomalous—lack of accountability for misconduct on the battlefield undertaken by civilian actors.

A number of U.S. soldiers have been convicted pursuant to the UCMJ for their roles in the abuses at Abu Ghraib and over 250 other military personnel were sanctioned in the years between 2001-2006 for instances of prisoner abuse. Schmitt, *Iraq Abuse Trial*, *supra*. Equally important, the military, as an institution answerable to Congress and committed to its self-imposed traditions of excellence and professionalism, has attempted to address systemic dysfunction within the chain of command that permitted the abuses at Abu Ghraib to occur in the first place.

For example, following revelations of abuse at Abu Ghraib, the military assigned an officer with the rank of Major General, who reported directly to the Commander of Multinational Forces in Iraq, to direct detention and interrogation operations. *See* U.N. Comm. Against Torture, *Second Periodic Reports of the States Parties Due in 1999: United States of America*, at 80, U.N. Doc. CAT/C/48/Add.3 (May 6, 2005). In response to Congressional guidance, the military has also increased training

requirements for intelligence units,[9] commissioned reports by high-level military officials to investigate and document individual and systematic errors made by the military,[10] and applied administrative sanctions to some of those with command responsibility.[11] In short, consistent with its status as a politically and legally accountable government entity, the military has taken meaningful measures to prevent the recurrence of the abuses at Abu Ghraib.

Absent traditional tort liability, there is not a meaningful mechanism to hold accountable those who engage in patently unlawful conduct or to deter

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[9] *See* Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1092, 118 Stat. 2069 (2004).

[10] *See generally* Major General Antonio M. Taguba, *Army Regulation 15-6 Investigation of the 800th Military Police Brigade* (2004); Major General George R. Fay, *Army Regulation 5-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade* (2004).

[11] *Amici* express no opinion with respect to ongoing debates about the adequacy of the disciplinary response to Abu Ghraib, but note that even the military's critics concede that administrative sanctions carry great weight within the professional officer corps. For example, Lt. Gen. Ricardo Sanchez, who was ultimately responsible for Abu Ghraib, "was never forwarded for assignments which would require a promotion. . . . [T]he military quietly ended his military career [, a sanction] in the ethic of the professional officer corps . . . typically seen as quite severe." Victor Hansen, *Creating and Improving Legal Incentives for Law of War Compliance*, 42 New Eng. L. Rev. 247, 258 (2008); *see also* Laura A. Dickinson, *Torture and Contract*, 37 Case W. Res. J. Int'l L. 267, 274 (2006) ("[W]ithin the military... demotion and firing are sanctions that are very strongly felt.").

private military contractors from abusing prisoners in the future. The criminal sanctions contained in the UCMJ do not apply to the conduct of the contractors in these cases.[12] While the Military Extraterritorial Jurisdiction Act ("MEJA"), 18 U.S.C. § 3261 *et seq.*, provides for the criminal prosecution in certain circumstances of civilians serving abroad, since the beginning of hostilities in Afghanistan and Iraq, it has not been used by U.S. prosecutors to address the grave abuses committed by contractors at Abu Ghraib. *See* Lieutenant General Anthony R. Jones, *Army Regulation 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade*, at 130-134 (2004). While MEJA has been utilized in a handful of successful prosecutions outside the context of the Abu Ghraib scandal, there remain significant jurisdictional and substantive limitations to its use against contractors. *See* Jennifer K. Elsea, Cong. Research Serv., *Private Security Contractors in Iraq and Afghanistan: Legal Issues*, R40991, at 22-24 (Jan. 17, 2010); *see also* Frederick Stein, *Have We Closed the Barn Door Yet? A Look at the Current Loopholes in the Military*

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[12] Congress recently amended the jurisdiction of the UCMJ to apply to civilians "serving with or accompanying an armed force in the field." 10 U.S.C. § 802 (a) (10). Yet in light of this Court's holding in *Reid v. Covert*, which held unconstitutional the application of military justice to civilians for crimes committed on overseas military bases, 354 U.S. 1, 40 (1957), there is a serious constitutional question as to whether the form of military justice embodied in these amendments could ever be applied to civilians presumptively entitled to constitutional protections. The constitutionality of military jurisdiction over civilians is highly uncertain precisely because of the fundamental distinction between soldiers and civilians.

Extraterritorial Jurisdiction Act, 27 Hou. J. Int'l L. 579, 596-97, 603 (2005) (characterizing MEJA as full of legal loopholes). In light of the statute's unusual requirements for triggering an investigation, broad prosecutorial discretion, and other practical obstacles to prosecution, MEJA in operation actually provides limited deterrence value. *See* Steven Paul Cullen, *Out of Reach: Improving the System to Deter and Address Criminal Acts Committed by Contractor Employees Accompanying Armed Forces Abroad*, 38 Pub. Cont. L.J. 509, 534-36 (2009).

At the same time, absent the coercive effect of tort liability, private military contractors have little incentive to prevent future abuses by their employees, through systemic reform or otherwise. Corporations may shift responsibility to individual employees and claim that they have fulfilled their legal obligations by firing them.[13] Even the reputational harm that might be visited upon a corporate entity for widespread misconduct may be largely avoided by a simple name change.[14] Retired

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[13] The comments of Blackwater CEO Erik Prince offer an illustrative example. In response to questions from Rep. Carolyn Maloney regarding an employee who shot and killed an Iraqi in the Green Zone while drunk, Prince answered, "He didn't have a job with us anymore. We, as a private company, cannot detain him. We can fire, we can fine, but we can't do anything else." *Blackwater USA: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 110th Cong. 59 (2007) (statement of Erik Prince, Chairman, the Prince Group, LLC and Blackwater USA).

[14] *See Blackwater Changes Its Name to Xe*, N.Y. Times, Feb. 13, 2009, at A10 (Blackwater Worldwide "abandon[ed] the brand name that has been tarnished by its work in Iraq, settling on Xe . . . as the new name for its family of two dozen

Marine Lieutenant Colonel Mike Zacchea reiterated these concerns when he said of contractors, "[T]hese guys are free agents on the battlefield. They're not bound by any law. . . . No one keeps track of them." Deborah Hastings, *Iraq Contractors Accused in Shootings*, Wash. Post, Aug. 11, 2007. Retired Army Colonel Teddy Spain also complained, "My main concern was their lack of accountability when things went wrong." Sudrasan Ragahavan & Thomas E. Ricks, *Private Security Put Diplomats, Military at Odds: Contractors in Iraq Fuel Debate*, Wash. Post, Sept. 26, 2007, at A01. Neither the employees' contractual duty to the corporation, nor the directors' obligations to shareholders, are an adequate substitute for military training and accountability.

It is for this reason that the Defense Department explicitly warned contractors that they would be subject to traditional liability rules for their misconduct and could not assume the Government's sovereign immunity to defeat litigation in U.S. Courts. Specifically, the Department advised military contractors that "[i]nappropriate use of force could subject a contractor or its subcontractors or employees to prosecution or *civil liability* under the laws of the United States and the host nation." Defense Federal Acquisition Regulation Supplement; Contractor Personnel Authorized to Accompany U.S. Armed

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businesses"); Andrew Ross Sorkin, *L-3 to Acquire Titan, Expanding Share of Military Market*, N.Y. Times, Jun. 5, 2005, at C2, (reporting that L3 Communications acquired Respondent Titan Corporation, which now operates under the "L3" moniker).

Forces (DFARS Case 2005–D013), 73 Fed. Reg. 16,764, 16,767 (Mar. 31, 2008) (emphasis added) (codified at 48 C.F.R. § 252.225-7040(b)(3)(iii)). Recognizing the unfairness that would result if civilian contractors are deemed immune from tort liability, the Defense Department has taken the position that governmental immunity should not result in "courts . . . shift[ing] the risk of loss to innocent third parties" when contractors cause injuries. *Id.* at 16,768.

In the absence of effective forms of military justice, training and discipline, tort liability provides a critical mechanism to ensure that a corporation's employees do not engage in abusive or unlawful treatment of "innocent third parties" to whom they owe a duty of care. *See* W. Paige Keeton, et al., *Prosser and Keeton on Torts* § 4, at 25 (5th ed. 1984) (stating that in the field of torts, "[t]he 'prophylactic' factor of preventing future harm" has been an important consideration for courts, which recognize that when "defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm"); Guido Calabresi, *The Cost of Accidents* 26-29, 95-129 (1970) (observing that tort liability forces corporations to internalize costs of employees' unlawful behavior and thus provides economic incentive to observe their duties in the future).

Under the court of appeals' formulation, this mechanism for accountability has been eviscerated. *Certiorari* should be granted to avoid this unacceptable result.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully submit that the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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